145-435

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 202.

SAMUEL H. KISSAM, HENRY N. WHITNEY, AND EUGENE R. WASHBURN, PLAINTIFFS IN ERROR,

vs.

HENRY J. ANDERSON, RECEIVER OF THE FIRST NATIONAL BANK OF ALBION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 11, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 15, 1891.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, in the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Henry J. Anderson, as receiver of the First National Bank of Albion, plaintiff, and Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn, defendants, a manifest error hath happened, to the great damage of the said defendants, as is stated and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,
2 with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth Monday of October next, before the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 1st day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

Allowed.

E. HENRY LACOMBE.

Oct. 1st, 1888.

3 [Endorsed:] E. & A. A. 779. Supreme Court of the United States. Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn, plaintiffs in error, against Henry J. Anderson, as receiver of the First National Bank of Albion, defendant in error. Writ. Due and timely service of a copy of within writ is hereby admitted. New York, Oct. 1st, 1888. William A. Beach, attorney for defendant in error. U. S. circuit court. Filed Oct. 2, 1888. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to two hundred and eleven, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn, plaintiffs in error, against Henry J. Anderson, as receiver of the First National Bank of Albion, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eighth day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

JOHN A. SHIELDS, *Clerk.*

4 Circuit Court of the United States for the Southern District of New York.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion, Plaintiff,
vs.
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURN, Defendants.

Timothy Griffith, clerk circuit court U. S., southern district of N. Y.:

You will please issue a summons to the defendants, Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn, in the above-entitled action.

CROWLEY, SAYLER, BLAKE & CORWINE,
Attorneys for Plaintiff,

Per H.

Office and post-office address, No. 2 Wall St., New York city.

5 [Endorsed:] Circuit court U. S., southern district of N. Y. Henry J. Anderson, as receiver, &c., *vs.* Samuel H. Kissam, H. N. Whitney, & E. R. Washburn. Præcipe for summons. Crowley, Sayler, Blake, Corwine, attorney- for plaintiff. U. S. circuit court. Filed Jan. 7, 1885. Timothy Griffith, clerk.

6 United States Circuit Court for the Southern District of New York.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion,
against
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURNE.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 7th day of January, in the year one thousand eight hundred and eighty-five.

[L. S.] TIMOTHY GRIFFITH. *Clerk.*

CROWLEY, SAYLER, BLAKE & CORWINE,
Plaintiff's Attorneys.

Office and post-office address, United Bank building, cor. B'way & Wall Sts., New York city.

7 United States Circuit Court, Southern District of New York.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion, Plaintiff,
—
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURN, Defendants.

The above-named plaintiff, by Crowley, Sayler, Blake and Corwine, his attorneys, complains of the above-named defendants, and for a cause of action against said defendants alleges that he is a resident of Scranton, in the State of Pennsylvania, and a citizen of the United States, and that the above-named defendants are citizens of the United States and residents of the State of New York and of the southern district of New York; that the said The First National Bank of Albion was at all the times hereinafter mentioned a national banking association, organized and incorporated on or about the 22nd day of December, 1863, under and by virtue of the provisions of an act of the Congress of the United States entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25th, 1863, and the acts amendatory thereof and supplementary thereto, under the name of "The First National Bank of Albion," to carry on the business of bank-

ing in the village of Albion, in the State of New York, and that afterwards and on or about February 21st, 1883, its articles of
8 association were duly amended and it was duly reorganized, and its corporate existence as such banking institution was duly extended under and by virtue of the provisions of an act of the Congress of the United States entitled "An act to enable national banking associations to extend their corporate existance and for other purposes," passed July 12th, 1882, and that it did carry on such banking business in said village down to and until the 22nd day of August, 1884, when the said bank closed its doors and then and there suspended and discontinued its business of banking and has not since resumed the same.

That on or about the 26th day of August, 1884, John S. Langworthy, being then deputy and acting Comptroller of the Currency of the United States and being thereto duly authorized by law, having become satisfied of the insolvency of the said "The First National Bank of Albion," under and in pursuance of an act of the Congress of the United States entitled "An act authorizing the appointment of receivers of national banks and for other purposes," approved June 30th, 1876, and the acts amendatory thereof and supplementary thereto, did appoint the plaintiff herein, Henry J. Anderson, receiver of the said "The First National Bank of Albion" by a certificate under his hand and the official seal of the Comptroller of the Currency, bearing date August 26th, 1884, and that thereupon this plaintiff duly qualified as such receiver and gave the bond and security required of him by said Comptroller, and on the 27th day of August, 1884, took possession of the books, records, and assets of every description of said "The First National Bank of Albion," and ever since has been and now is en-
9 gaged in the discharge of his duties as such receiver; among which duties is the collection of all debts due to the said "The First National Bank of Albion."

That—all the times hereinafter mentioned the said defendants were and now are copartners and carrying on business as bankers and brokers in the city of New York, in said southern district of New York, under the firm name and style of "Kissam, Whitney & Co."

That during all the times hereinafter mentioned one Albert S. Warner was the cashier of the said "The First National Bank of Albion."

That, as this plaintiff is informed and believes, on or about May 1, 1880, at the city of New York, in said southern district of New York, the said Warner made an arrangement and agreement with the said defendants to speculate in stocks on his own account through the said defendants' firm acting as his brokers, and that from the time last aforesaid down to nearly the time when said bank closed its doors and suspended and discontinued business as aforesaid he, the said Warner, was speculating in stocks on his own account through the said defendants' firm, then acting as his brokers, and had kept an account with said defendants' firm, and from time to time during that time supplied them with money or "margin" for

the management of said account and said speculations in stocks, to be used under the direction and for the benefit of said Warner individually in connection with and in furtherance of his stock speculations, which moneys so supplied and furnished by said Warner to said defendants' firm were, as this plaintiff is informed and believes, the moneys of the said "The First National Bank of
10 Albion," and were so supplied and furnished by the said Warner to the said defendants' firm by the said Warner drawing and giving to said defendants his checks, drawn to the order of said defendants' firm upon the Third National Bank of the City of New York, and signed the same "A. S. Warner, cash. First Na'l B'k of Albion, N. Y.," or and in some instances signing his name as "pres't" of said bank, and in some instances by sending to said defendants moneys by express.

That from May 1, 1880, down to the suspension of said bank as aforesaid, as this plaintiff is informed and believes, the said "The First National Bank of Albion" had and kept moneys and an account with the said Third National Bank of the City of New York, which fact was known to the said defendants.

And this plaintiff further alleges upon information and belief that, in pursuance of the aforesaid arrangement and agreement and in the execution thereof, heretofore and on or about May 11, 1880, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *May* 11, 1880.

Third National Bank of the City of New York pay to the order of Kissam, Whitney & Co. ten thousand dollars.

$10,000. A. S. WARNER,
Cash. First Nat. B'k of Albion, N. Y."

11 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of ten thousand dollars, from the Third National Bank of the City of New York out of and from the moneys and account of the said "The First National Bank of Albion" so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of ten thousand dollars.

Second. And for a further and second cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that in pursuance of the aforesaid arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about June 9th, 1880, at the village of Albion aforesaid,

the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. ALBION, N. Y., *June 9th*, 1880.

Third National Bank of the City of New York pay to the order of Kissam, Whitney & Co. five thousand dollars.

$5,000. A. S. WARNER,
Cash. First Nat. B'k of Albion, N. Y."

12 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of five thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of five thousand dollars.

Third. And for a further and third cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the aforesaid arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about August 14, 1880, at the village of Albion aforesaid, the said Warner made and delivered to the said defendants a certain draft bearing date on that day; which draft is in the words and figures following:

First National Bank, Albion, N. Y.

$706.08. No. 18157.

The First National Bank of Albion.

ALBION, N. Y., *Aug.* 14, 1880.

Pay to the order of Kissman, Whitney & Co. seven hundred and six .08 dollars.

706.08. A. S. WARNER, *Cashier.*

To the Third National Bank, New York.

13 That thereupon the said defendants received the said draft and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of seven hundred and six dollars and eight cents, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the Third Na-

tional Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of seven hundred and six dollars and eight cents.

Fourth. And for a further and fourth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the said agreement and arrangement and in the execution and furtherance thereof, heretofore and on or about December 23, 1880, at the city of New York aforesaid, the said Warner made and delivered to said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *Dec.* 23, 1880.

Third National Bank

Pay to the order of Kissam, Whitney & Co. eight thousand dollars.
$8,000. A. S. WARNER,
Cash. First N. Bank, Albion, N. Y."

14 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of eight thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of eight thousand dollars.

Fifth. And for a further and fifth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the aforesaid arrangements and agreement and in the execution and furtherance thereof heretofore and on or about January 10, 1881, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *Jan'y* 10, 1881.

Third National Bank pay to the order of Kissam, Whitney & Co. five thousand dollars.
$5,000. A. S. WARNER,
Cash. First Nat. B'k, Albion, N. Y."

15 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of five thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of five thousand dollars.

Sixth. And for a further and sixth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the aforesaid arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about January 11, 1881, at the city of New York aforesaid, the said Warner made a certain check and delivered the same to the said defendants, bearing date on that day, drawn upon the printed form of the Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *Jan'y* 11, 1881.

Third National Bank

Pay to the order of Messrs. Kissam, Whitney & Co. ten thousand dollars.

$10,000. A. S. WARNER,
Cash. First Nat. Bank of Albion, N. Y."

16 That thereupon the said defendants received the said check and endorsed the same in their said firm name, "Kissam, Whitney & Co.," and obtained and received the money thereon, to wit, said sum of ten thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of ten thousand dollars.

Seventh. And for a further and seventh cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the arrangement and agreement aforesaid and in the execution and furtherance thereof, heretofore and on or about January 13, 1881, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the

printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *Jan'y* 13, 1881.

Third National Bank

Pay to the order of Messrs. Kissam, Whitney & Co. fifteen thousand dollars.

$15,000. A. S. WARNER,
Cash. First Nat. B'k of Albion, N. Y."

17 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the moneys thereon, to wit, said sum of fifteen thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the speculative account of the said Warner with said sum of fifteen thousand dollars.

Eight. And for a further and eighth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the aforesaid arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about January 17, 1881, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *Jan'y* 17, 1881.

Third National Bank

Pay to the order of Messrs. Kissam, Whitney & Co. ten thousand dollars.

$10,000. A. S. WARNER,
Cash. First Nat. B'k of Albion, N. Y."

18 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of ten thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of ten thousand dollars.

Ninth. And for a further and ninth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the aforesaid arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about January 24, 1881, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the city of New York; which check is in the words and figures following:

"No. —. NEW YORK, *Jan'y* 24, 1881.

Third National Bank

Pay to the order of Kissam, Whitney & Co. ten thousand dollars.
$10,000.

A. S. WARNER,
Cash. First Nat. B'k of Albion, N. Y."

19 That thereupon the said defendants received the said check and endorsed the same in their said firm name of Kissam, Whitney & Co. and obtained and received the money thereon, to wit, said sum of ten thousand dollars, from the said Third National Bank of the City of New York out — and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept — it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of ten thousand dollars.

Tenth. And for a further and tenth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the aforesaid arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about February 1, 1881, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *Feb'y 1st*, 1881.

Third National Bank

Pay to the order of Kissam, Whitney & Co. five thousand dollars.
$5,000. A. S. WARNER,
Cash. First Nat. B'k, Albion, N. Y."

20 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of five thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of five thousand dollars.

Eleventh. And for a further and eleventh cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the aforesaid arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about March 25, 1881, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *M'ch* 25, 1881.

Third National Bank

Pay to the order of Kissam, Whitney & Co. five thousand dollars.
$5,000. A. S. WARNER,
Cash'r First Nat. Bank, Albion, N. Y."

21 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of five thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of five thousand dollars.

Twelfth. And for a further and twelfth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about August 9, 1881, at the city of New York aforesaid the said Warner made and delivered to the said defendants a certain check, bearing date on that day, drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. NEW YORK, *Aug.* 9, 1881.

Third National Bank of the City of New York

Pay to the order of Kissam, Whitney & Co. ten thousand dollars.
$10,000. A. S WARNER,
Cash. First Nat. B'k of Albion, N. Y."

22 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of ten thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the speculative account of the said Warner and the said speculative account of the said Warner with said sum of ten thousand dollars.

Thirteenth. And for a further and thirteenth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about August 26, 1881, at the village of Albion aforesaid, the said Warner made and delivered to the said defendants a certain check, bearing date on that day, and drawn upon the printed form of the said Third National Bank of the City of New York; which check is in the words and figures following:

"No. —. ALBION, N. Y., *Aug.* 26, 1881.

Third National Bank of the Ciy of New York

Pay to the order of Kissam, Whitney & Co. ten thousand dollars.
$10,000. A. S. WARNER,
Cash. First Nat. Bank of Albion, N. Y."

23 That thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of ten thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of ten thousand dollars.

Fourteenth. And for a further and fourteenth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in

the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about October 25, 1883, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check bearing date on that day; which check is in the words and figures following:

"$400. NEW YORK, *Oct.* 25, 1883.

Third National Bank pay to the order of Messrs. Kissam, Whitney & Co. four hundred dollars, value received, and charge the same to account of—

A. S. WARNER,
Pres't. First Nat. Bank of Albion, N. Y."

To —— ——.

24 That the said Warner was then, as this plaintiff is informed and believes, the president of the said The First National Bank of Albion aforesaid, and that the said defendants thereupon received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of four hundred dollars, from said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon credited the said Warner and the said speculative account of the said Warner with said sum of four hundred dollars.

Fifteenth. And for a further and fifteenth cause of action against the said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the aforesaid arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about the 24th day of January, 1884, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of and belonging to the said The First National Bank of Albion amounting to and of the value of one thousand eight hundred dollars, and the said defendants received the same in

25 the city of New York aforesaid and used the same in the stock speculations of the said Warner individually and credited the said Warner and the speculative account of the said Warner with the sum of one thousand eight hundred dollars; that the said defendants knew when they so received the same and used and credited the same as aforesaid that said moneys, funds, and assets were the moneys, funds, assets of the said The First National Bank of Albion and that the said Warner was at that time the president of said The First National Bank of Albion.

Sixteenth. And for a further and sixteenth case of action against

the said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about March 27, 1884, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of three thousand five hundred dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the speculative account of the said Warner with said sum of three thousand five hundred dollars; that the said defendants knew when they so received the same and used and credited the same as aforesaid that said moneys, funds, and assets were the moneys, funds, and
26 assets of the said The First National Bank of Albion and that the said Warner was at that time the president of said The First National Bank of Albion.

Seventeenth. And for a further and seventeenth cause of action against said defendants this plaintiff, incorporating herein and making a part thereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about April 5, 1882, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of ten thousand dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the speculative account of the said Warner with the said sum of ten thousand dollars; that the said defendants knew when they so received the same and used and credited the same as aforesaid that said moneys, funds, and assets were the moneys, funds, and assets of the said The First National Bank of Albion and that the said Warner was at that time the president of said The First National Bank of Albion.

Eighteenth. And for a further and eighteenth cause of action against said defendants this plaintiff, incorporating and making a part hereof the averments and allegations contained in the
27 first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about April 5, 1882, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of ten thousand dollars, payable to the order of the said defendants

under their name of "Kissam, Whitney & Co." and signed "A. S. Warner, p't;" that thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co."; and obtained and received the money thereon, to wit, said sum of ten thousand dollars, from the Third National Bank of the City of New York aforesaid out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendant- thereupon used the same for the benefit of and in stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of ten thousand dollars; that when the said Warner made and delivered said check as aforesaid he was the president of said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

28 Nineteenth. And for a further and nineteenth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of such arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about September 19, 1883, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of ten thousand dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the speculative account of the said Warner with said sum of ten thousand dollars; that the said Warner was at the time last aforesaid the president of the said The First National Bank of Albion, and that said defendants knew when they so received said moneys, funds, and assets and used and credited the same as aforesaid that the said moneys, funds, and assets were the moneys, funds, and assets of the said The First National Bank of Albion.

Twentieth. And for a further and twentieth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the arrangement and agreement aforesaid and in the execution and furtherance thereof,

29 heretofore and on or about September 9, 1883, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of ten thousand dollars, payable to the order of the said defendants under their firm name of "Kissam, Whitney & Co." and

signed by said Warner as president of said The First National Bank of Albion; that thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of ten thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of ten thousand dollars; that when said Warner made and delivered the said check as aforesaid he was the president of said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Twenty-first. And for a further and twenty-first cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in
30 the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about September 19, 1883, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of five hundred ninety-seven dollars and ninety-two cents, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of five hundred ninety-seven dollars and ninety-two cents; that when said defendants received said moneys, funds, and assets as aforesaid they knew that the same were the moneys, funds, and assets of the said The First National Bank of Albion; that at the time last aforesaid the said Warner was the president of the said The First National Bank of Albion.

Twenty-second. And for a further and twenty-second cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about November 13, 1883, at the vil-
31 lage of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of eight thousand dollars,

and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the speculative account of the said Warner with said sum of eight thousand dollars; that the said Warner was at the time last aforesaid the president of the said The First National Bank of Albion, and the said defendants knew when they so received the said moneys, funds, and assets, and used and credited the same as aforesaid that said moneys, funds, and assets were the moneys, funds, and assets of the said The First National Bank of Albion.

Twenty-third. And for a further and twenty-third cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the arrangement and agreement aforesaid and in the execution and furtherance thereof, heretofore and on or about November 13, 1883, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of eight thousand dollars, payable to the order of the said defendant- under their firm name of "Kissam, Whitney
32 & Co." and signed by said Warner as the president of said The First National Bank of Albion; that thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of eight thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with the said sum of eight thousand dollars; that when the said Warner made and delivered the said check as aforesaid he was the president of said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Twenty-fourth. And for a further and twenty-fourth cause of action against said defendant- this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof,
33 heretofore and on or about November 13, 1883, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for

the sum of three thousand dollars, payable to the order of the said defendants under their firm name of "Kissam, Whitney & Co." and signed by said Warner as president of said The First National Bank of Albion; that thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of three thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and accounts of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of three thousand dollars; that when the said Warner made and delivered the said check as aforesaid he was the president of said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Twenty-fifth. And for a further and twenty-fifth cause of action against said defendants this plaintiff, incorporating herein
34 and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about November 13, 1883, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the City of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of three thousand dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of three thousand dollars; that at the time last aforesaid the said Warner was the president of the said The First National Bank of Albion, and that the said defendants knew when they received said moneys, funds, and assets as aforesaid that they were the moneys, funds, and assets of the said The First National Bank of Albion.

Twenty-sixth. And for a further and twenty-sixth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about November 15, 1883, at
35 the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York afore-

said, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of four thousand dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the speculative account of the said Warner with said sum of four thousand dollars; that the said Warner was at the time last aforesaid president of the said The First National Bank of Albion, and the said defendants knew when they so received the said moneys, funds, and assets and used the same as aforesaid that said moneys, funds, and assets were the moneys, funds, and assets of the said The First National Bank of Albion.

Twenty-seventh. And for a further and twenty-seventh cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about November 15, 1883, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of four thousand dollars, payable to the order of said defendants under their firm name of "Kissam, Whitney & Co." and signed by said Warner as the president of said The First National Bank of
36 Albion; that thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained and received the money thereon, to wit, said sum of four thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with the said sum of four thousand dollars; that when the said Warner made and delivered the said check as aforesaid he was the president of the said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that the said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Twenty-eighth. And for a further and twenty-eight- cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about December 12, 1883, at the village of Albion aforesaid, the said Warner sent and delivered to

37 the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of five thousand two hundred sixty-seven dollars and thirty-six cents, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculation- of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of five thousand two hundred sixty-seven dollars and thirty-six cents; that at the time last aforesaid the said Warner was the president of the said The First National Bank of Albion, and that the said defendants knew when they received said moneys, funds, and assets as aforesaid that they were the moneys, funds, and assets of the said The First National Bank of Albion.

Twenty-ninth. And for a further and twenty-ninth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the arrangement and agreement aforesaid and in the furtherance thereof, heretofore and on or about December 12, 1883, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of five thousand two hundred sixty-seven dollars and thirty-six cents, payable to the order of said defendants under their firm name

38 of "Kissam, Whitney & Co." and signed by the said Warner as the president of the said The First National Bank of Albion; that thereupon the said defendants received the said check and endorsed the same in their firm name of Kissam, Whitney & Co. and obtained the money thereon, to wit, said sum of five thousand two hundred sixty-seven dollars and thirty-six cents, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of five thousand two hundred sixty-seven dollars and thirty-six cents; that when the said Warner made and delivered the said check as aforesaid he was the president of the said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Thirtieth. And for a further and thirtieth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon

information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof,
39 heretofore and on or about December 31, 1883, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of seven thousand eight hundred and fifty dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of seven thousand eight hundred and fifty dollars; that at the time last aforesaid the said Warner was the president of the said The First First National Bank of Albion, and that the said defendants knew when they received said moneys, funds, and assets as aforesaid that they were the moneys, funds, and assets of the said The First National Bank of Albion.

Thirty-first. And for a further and thirty-first cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about December 31, 1883, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of seven thousand eight hundred and fifty dollars, payable to the order of the said defendants under their firm name of "Kissam,
40 Whitney & Co." and signed by the said Warner as the president of the said The First National Bank of Albion; that thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained the money thereon, to wit, said sum of seven thousand eight hundred and fifty dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculation of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of seven thousand eight hundred and fifty dollars; that when the said Warner made and delivered the said check as aforesaid he was the president of the said The First National Bank of Albion, and that said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Thirty-second. And for a further and thirty-second cause of action against said defendants this plaintiff, incorporating herein and mak-

ing a part hereof the allegations and averments contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the arrangement and agreement aforesaid and in the execution and furtherance thereof, heretofore and on or about March 7, 1884, at the village of
41 Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of five thousand dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of said Warner with said sum of five thousand dollars; that at the time last aforesaid the said Warner was the president of the said The First National Bank of Albion, and that the said defendants knew when they received said moneys, funds, and assets as aforesaid that they were the moneys, funds, and assets of the said The First National Bank of Albion.

Thirty-third. And for a further and thirty-third cause of action against the said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about March 7th, 1884, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of five thousand dollars, payable to the order of said defendants under their firm name of "Kissam, Whitney & Co." and signed by the said Warner as the president of the said The
42 First National Bank of Albion; that thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained the money thereon, to wit, said sum of five thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of five thousand dollars; that when the said Warner made and delivered the said check as aforesaid he was the president of the said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Thirty-fourth. That for a further and thirty-fourth cause of action against said defendants this plaintiff, making a part hereof and in-

corporating herein the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the agreement and arrangement aforesaid and in the execution and furtherance thereof, heretofore and on or about April 11, 1884, at the city of New York aforesaid, the said Warner made and delivered to the
43 said defendants a certain check drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of five thousand dollars, payable to the order of the said defendants under their firm name of "Kissam, Whitney & Co." and signed by the said Warner as the president of the said The First National Bank of Albion; that thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained the money thereon, to wit, said sum of five thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of five thousand dollars; that when the said Warner made and delivered the said check as aforesaid he was the president of the said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Thirty-fifth. And for a further and thirty-fifth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations con-
44 tained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about April 11, 1884, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of five thousand dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of five thousand dollars; that at the time last aforesaid the said Warner was the president of the said The First National Bank of Albion, and that the said defendants knew when they received said moneys, funds, and assets as aforesaid that they were the moneys, funds, and assets of the said The First National Bank of Albion.

Thirty-sixth. And for a further and thirty-sixth cause of action against said defendants this plaintiff, incorporating herein and

making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the arrangement and agreement aforesaid and in the execution and futherance thereof, heretofore and on or about April 25, 1884, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys,
45 funds, and assets of the said The First National Bank of Albion amounting to and of the value of three thousand five hundred thirty dollars and twelve cents, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of three thousand five hundred thirty dollars and twelve cents; that the said Warner was as the time last aforesaid the president of the said The First National Bank of Albion, and the said defendants knew when they so received the said moneys, funds, and assets and used and credited the same as aforesaid that the said moneys, funds, and assets were the moneys, funds, and assets of the said The First National Bank of Albion.

Thirty-seventh. And for a further and thirty-seventh cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about April 25, 1884, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of three thousand five hundred thirty dollars and twelve cents, payable to the order of the said defendants under their firm name of
"Kissam, Whitney & Co." and signed by the said Warner as
46 the president of said The First National Bank of Albion; that thereupon the said defendants received the check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained the money thereon, to wit, said sum of three thousand five hundred thirty dollars and twelve cents, from the said The Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of three thousand five hundred thirty dollars and twelve cents; that when the said Warner made and delivered the said check as aforesaid he was the president of the said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by

them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion.

Thirty-eight. And for a further and thirty-eighth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action hereof from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of the said arrangement and agreement and in the execution and furtherance thereof, heretofore, to wit, on or about July 28, 1884, at the village of Albion aforesaid, the said Warner sent and delivered to the said
47 defendants, *of* the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and of the value of eight thousand dollars, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of eight thousand dollars; that at the time last aforesaid the said Warner was the president of the said The First National Bank of Albion, and that the said defendants when they received said moneys, funds, and assets as aforesaid knew that they were the moneys, funds, and assets of the said The First National Bank of Albion.

Thirty-ninth. And for a further and thirty-ninth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about July 28, 1884, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check, drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of eight thousand dollars, payable to the order of the said defendants under their firm name of "Kissam, Whitney & Co." and signed by the said Warner as the president of said The First National Bank of Albion; that thereupon the said defendants received the said check
48 and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained the money thereon, to wit, said sum of eight thousand dollars, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of eight thousand dollars; that when the said Warner made and delivered the said check as aforesaid he was the president of the said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as

aforesaid was the money of the said The First National Bank of Albion.

Fortieth. And for a further and fortieth cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about July 28, 1884, at the village of Albion aforesaid, the said Warner sent and delivered to the said defendants, at the city of New York aforesaid, moneys, funds, and assets of the said The First National Bank of Albion amounting to and
49 of the value of two thousand five hundred sixty-two dollars and fifty cents, and the said defendants received the same in the city of New York aforesaid and used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of two thousand five hundred and sixty-two dollars and fifty cents; that at the time last aforesaid the said Warner was the president of the said First National Bank of Albion, and that the said defendants knew when they received the said moneys, funds, and assets as aforesaid that they were the moneys, funds, and assets of the said The First National Bank of Albion.

Forty-first. And for a further and forty-first cause of action against said defendants this plaintiff, incorporating herein and making a part hereof the averments and allegations contained in the first cause of action herein from folios one to ten, inclusive, alleges upon information and belief that, in pursuance of said arrangement and agreement and in the execution and furtherance thereof, heretofore and on or about July 28, 1884, at the city of New York aforesaid, the said Warner made and delivered to the said defendants a certain check drawn upon the Third National Bank of the City of New York, bearing date on that day, for the sum of two thousand five hundred sixty-two dollars and fifty cents, payable to the order of the said defendants under their firm name of "Kissam, Whitney & Co." and signed by the said Warner as the president of the said The First National Bank of Albion; that
50 thereupon the said defendants received the said check and endorsed the same in their said firm name of "Kissam, Whitney & Co." and obtained the money thereon, to wit, said sum of two thousand five hundred sixty-two dollars and fifty cents, from the said Third National Bank of the City of New York out of and from the moneys and account of the said The First National Bank of Albion so as aforesaid had and kept by it with the said Third National Bank of the City of New York, and the said defendants thereupon used the same for the benefit of and in the stock speculations of the said Warner individually and credited the said Warner and the said speculative account of the said Warner with said sum of two thousand five hundred sixty-two dollars and fifty cents; that when the said Warner made and delivered the said check

as aforesaid he was the president of the said The First National Bank of Albion, and that the said defendants knew when they received the said check and obtained and credited the money so as aforesaid received by them thereon that said money so received by them as aforesaid was the money of the said The First National Bank of Albion; and this plaintiff further alleges upon information and belief that the said defendants received the several sums of money and the funds and assets aforesaid and hereinbefore specifically enumerated and obtained the checks hereinbefore specifically mentioned and obtained the money on said checks, as hereinbefore mentioned, with the knowledge that, while said moneys, funds, assets, and checks, and all and each of them, purported to be and to be used and to be drawn for the business of the said The
51 First National Bank of Albion, in fact the said moneys, funds, assets, and check and the moneys obtained upon said checks were used and the said checks drawn and the moneys obtained thereon for the private speculative account and stock speculations of the said Albert S. Warner, and his said account with said defendants was thereupon credited with said moneys, funds, assets, and checks and with the moneys obtained upon said checks respectively by said defendants, and that the said defendants had notice and were well aware during all the times hereinbefore mentioned and when the transactions hereinbefore set forth took place that the said Albert S. Warner had not as such cashier or as such president nor had the said The First National Bank of Albion lawful authority to speculate in stocks; that said speculations in stocks and the said speculative account were carried on by the said Warner for his own benefit, and that he fraudulently misapplied for use in his said speculations and said speculative account the moneys so as aforesaid furnished to said defendants by means of said checks, moneys funds, and assets.

Wherefore this plaintiff demands judgment against the said defendant for the sum of two hundred and fifty thousand dollars, damages suffered by the said The First National Bank of Albion by reason of the aforesaid acts of the said defendants, together with the costs of this action.

CROWLEY, SAYLER, BLAKE & CORWINE,
Plaintiff's Attorneys, United Bank Building,
52 *Cor. Broadway & Wall Street, New York City.*

STATE OF PENNSYLVANIA, } ss:
Western District, }

Henry J. Anderson, being duly sworn, deposes and says that he is the receiver of the First National Bank of Albion and is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

HENRY J. ANDERSON.

Subscribed and sworn to before me this 6th day of January, 1885.
MILO J. WILSON,
U. S. Court, at Scranton.

(Endorsed:) U. S. circuit court, southern district of N. Y. Henry J. Anderson, as receiver of the First National Bank of Albion, plaintiff, *vs.* Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn, defendants. Complaint. Hoyt & Hine, attorneys for ——, 27 to 30 White Memorial building, Syracuse, N. Y.

53 United States Circuit Court, Southern District of New York.

HENRY J. ANDERSON, as Receiver, &c.,
against
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURNE.

United States Circuit Court, Southern District of New York.

HENRY J. ANDERSON, as Receiver, &c.,
against
GEORGE H. CHASE & THOMAS B. ATKINS.

It is hereby stipulated that William A. Beach, of Syracuse, N. Y., be, and he is hereby, substituted as attorney for the plaintiff in the above-entitled actions in the place of Crowley, Sayler, Blake and Corwine, and that an order to that effect may be duly entered on the production and filing of this stipulation.

Dated August 10th, 1885.

CROWLEY, SAYLER, BLAKE & CORWINE,
Pl'ff's Att'ys.

—— ——, *Def'ts' Att'ys.*

(Endorsed:) U. S. circuit court, so. dist. of N. Y. Henry J. Anderson, as receiver, &c., *vs.* Samuel H. Kissam & others. Same pl'ff *vs.* Geo. H. Chase & another. Stip'n substituting att'y for pl'ff. U. S. circuit court. Filed Sept. 10, 1885. Timothy Griffith, cl'k.

53½ United States Circuit Court, Southern District of New York.

HENRY J. ANDERSON, as Receiver,
ag'st
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURNE.

HENRY J. ANDERSON, as Receiver,
ag'st
GEORGE H. CHASE & THOMAS B. ATKINS.

Order Entered by Consent in Two Cases Substituting Wm. A. Beach as Plaintiff's Attorney.

On filing the stipulation and consent for substitution of attorneys for plaintiffs, signed by Crowley, Sayler, Blake, and Corwin, Esqrs., heretofore attorneys of record for the plaintiffs in the two above

entitled actions, and on motion of William C. Cox, No. 245 Broadway, New York city, it is ordered that William A. Beach, Esq., of Syracuse, N. Y., be, and he hereby is, substituted in place of Crowley, Sayler, Blake, and Corwin as plaintiff's attorney in the above-entitled actions.

An extract from the Rule Book.

N. Y., Sept. 10, '85.

54 (Endorsed:) United States circuit court for the southern district of New York. Henry J. Anderson, as receiver of the First National Bank of Albion, against Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburne. Answer. Burrill, Zabriskie & Burrill, attorneys for defendants, 21 Broad street (Mills building), New York city. U. S. circuit court. Filed Mar. 21, 1885. Timothy Griffith, clerk. Service of a copy of the within answer is hereby admitted. Crowley, Sayler, Blake & Corwine, per Houpt. N. Y., March 19th, 1885.

55 United States Circuit Court for the Southern District of New York.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion,
against
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURNE.

The defendants above named, by Burrill, Zabriskie & Burrill, their attorneys, in answer to the complaint herein, allege:

First. In answer to the first cause of action in said complaint stated, these defendants have no knowledge or information sufficient to form a belief whether the plaintiff herein at the time of the commencement of this action was a citizen of the State of Pennsylvania, or whether the first National Bank of Albion in the complaint mentioned was organized and incorporated, as in said complaint alleged, under the acts of Congress therein mentioned; or whether its articles of association were amended; or whether it was duly reorganized and its corporate existence extended, as in said complaint alleged, under the acts of Congress therein mentioned or otherwise; or whether it carried on the banking business during the time and until the date stated in said complaint; or whether the plaintiff herein was

56 appointed receiver of the said First National Bank of Albion at the time or in the manner or by the person or officer or under the circumstances in said complaint mentioned; or whether John S. Langworthy in said complaint mentioned, at the time of said alleged appointment was deputy or acting Comptroller of the Currency of the United States; or whether he was as such deputy or such acting comptroller or otherwise authorized by law to appoint said plaintiff such receiver; or whether said plaintiff qualified as such receiver or gave the bond or security in said complaint mentioned; or whether at the time in said complaint stated said plain-

tiff took possession of the books, records, or assets of said First National Bank of Albion.

These defendants admit that on the 1st day of May, 1880, these defendants became and still are copartners in business as bankers and brokers in the city of New York under the firm name of Kissam, Whitney & Co., and that Albert S. Warner was during some part of said period cashier and president of said First National Bank of Albion, but during what period he was such cashier and during what period he was such president these defendants have no knowledge or information sufficient to form a belief.

These defendants admit that said Warner, on the 1st day of May, 1880, had an account with said firm of Kissam, Whitney & Co., which continued, and that during its continuance said firm acted as his bankers and brokers and bought and sold stocks, bonds, and other securities on commission on his account and received from and paid out moneys for him; but these defendants deny that the said Warner made any arrangement or agreement with these defendants to speculate in stocks through these defendants, or that during the period stated in the complaint or any portion thereof he was speculating in stocks or did so speculate through these defendants.

These defendants allege that during the continuance of said account they from time to time, at the request and by the direction of the said Warner, paid to and deposited with the said Third National Bank in the complaint mentioned, to the credit and for account
57 of the said First National Bank of Albion, divers large sums of money, which were by the said Third National Bank used and applied to meet and pay obligations of said First National Bank of Albion, and checks and drafts drawn on it by said Warner as cashier or president of said First National Bank of Albion, including those in the complaints mentioned, and that the said moneys so paid and deposited by these defendants were charged to the said Warner in his account with these defendants.

And on information and belief these defendants allege that during the same period said Warner also paid to and deposited with said Third National Bank, to the credit of said First National Bank of Albion, other moneys which did not belong to said last-mentioned bank and which were in like manner used and applied by said Third National Bank to the payment of checks and drafts drawn in the name of said Warner as cashier or as president as aforesaid.

These defendants admit that during said period these defendants did receive from said Warner checks drawn to the order of said firm of Kissam, Whitney & Co. upon the Third National Bank of the City of New York, some of which were signed "A. S. Warner, cash.," or "cashier," First National Bank of Albion, New York, and others of which were signed "A. S. Warner, president," and also during the same time received from said Warner moneys by express; but these defendants say that they have no knowledge or information sufficient to form a belief whether they received the check mentioned or set forth in the first cause of action in said complaint or endorsed or collected the same, or whether the check

therein mentioned is a copy of any check delivered to or received or endorsed or collected by these defendants; but they deny that said check or any of the checks specified in the complaint was paid by the said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third
58 National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said complaint; and these defendants deny that any checks, moneys, or funds received from said Warner were so received in pursuance of the alleged agreement in the complaint mentioned, and deny each and every other allegation in said cause of action contained.

Second. These defendants, in answer to the second cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the second cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks
59 were repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said second cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Third. These defendants, in answer to the third cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein from the commencement thereof to and including the words "as president as aforesaid," in the 10th

folio hereof, and say that they have no knowledge or information sufficient to form a belief whether the defendants received the check mentioned or set forth in the third cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants on information and belief deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, assets, or securities, funds of the said First National Bank of
60 Albion, as alleged in said third cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Fourth. These defendants, in answer to the fourth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the fourth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Fifth. These defendants, in answer to the fifth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commence-
61 ment thereof to and including the words "as president as

aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the fifth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Sixth. These defendants, in answer to the sixth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the sixth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or
62 received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Seventh. These defendants, in answer to the seventh cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the com-

mencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the seventh cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and fur-
63 nished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action, and these defendants deny each and every other allegation in said cause of action contained.

Eighth. These defendants, in answer to the eighth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the eighth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of the moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to the said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, ac-
64 count, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Ninth. These defendants, in answer to the ninth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement

thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the ninth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Tenth. These defendants, in answer to the tenth cause of action in the complaint mentioned, incorporate herein and make a
65 part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the tenth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Eleventh. These defendants, in answer to the eleventh cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in

their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the eleventh cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

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Twelfth. These defendants, in answer to the twelfth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the twelfth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

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Thirteenth. These defendants, in answer to the thirteenth cause of action in the complaint mentioned, incorporate herein and make

a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the thirteenth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received
68 from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Fourteenth. These defendants, in answer to the fourteenth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned or set forth in the fourteenth cause of action in the complaint herein or endorsed or collected the same, or whether said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained.

Fifteenth. These defendants, in answer to the fifteenth
69 cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the fifteenth cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him as in said fifteenth cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said fifteenth cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants fully accounted for and paid over the same and the proceeds thereof to the said First National Bank of Albion; and these defendants deny each and every allegation in said fifteenth cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Sixteenth. These defendants, in answer to the sixteenth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the sixteenth cause of action alleged or any part thereof, if sent or delivered to these defendants by said Warner, were applied or used for his benefit or credited to him as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank
70 of Albion these defendants fully accounted for and paid over the same and the proceeds thereof to the said First National Bank of Albion; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Seventeenth. These defendants, in answer to the seventeenth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the seventeenth cause of action alleged or any part thereof, if sent or delivered to these defendants by said Warner, were applied or used for his benefit or credited to him as in said cause of

action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants fully accounted for and paid over the same and the proceeds thereof to the said First National Bank of Albion; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Eighteenth. These defendants, in answer to the eighteenth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the
71 commencement thereof to and including the words "as president as aforesaid," in the tenth folio hereof, and say that they have no knowledge or information sufficient to form a belief whether these defendants received the check mentioned in the eighteenth cause of action in the complaint herein or endorsed or collected the same, and these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Nineteenth. These defendants, in answer to the nineteenth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as, aforesaid," in the 10th folio hereof, and deny that the moneys, funds and assets in the nineteenth cause of action alleged or any part thereof were delivered to or received by these defendants
72 from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets re-

ferred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was presideut of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Twentieth. These defendants, in answer to the twentieth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the twentieth cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sum was paid by said First National Bank on account of the said checks was repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said
73 cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Twenty-first. These defendants, in answer to the twenty-first cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets of said First National Bank of Albion in the twenty-first cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each

and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Twenty-second. These defendants, in answer to the twenty-second cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets of said First National Bank of Albion in the twenty-second cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

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Twenty-third. These defendants, in answer to the twenty-third cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the twenty-third cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sum was paid by said First National Bank on account of the said checks was repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion,

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in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Twenty-fourth. These defendants, in answer to the twenty-fourth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the twenty-fourth cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of the moneys so deposited with and paid to the Third National Bank by said Warner or these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sum was paid by said First National Bank on account of the said checks was repaid to said bank by said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any money, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

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Twenty-fifth. These defendants, in answer to the twenty-fifth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the twenty-fifth cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Twenty-sixth. These defendants, in answer to the twenty-sixth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore

contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the twenty-sixth cause of action alleged or any part thereof were delivered to or received by
77 these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or *was* in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of the said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Twenty-seventh. These defendants, in answer to the twenty-seventh cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the twenty-seventh cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sum was paid by said First National Bank on account of the said checks was repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National
78 Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Twenty-eighth. These defendants, in answer to the twenty-eighth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the twenty-eighth cause of action alleged or

any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the time therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Twenty-ninth. These defendants, in answer to the twenty-ninth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the twenty-ninth cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sum was paid by said First National Bank on account of the said checks was repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

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Thirtieth. These defendants, in answer to the thirtieth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the thirtieth cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action

were in fact delivered to or received by them or were in fact
80 the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Thirty-first. These defendants, in answer to the thirty-first cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the thirty-first cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sum was paid by said First National Bank on account of said checks was repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein
mentioned said Warner was president of said First National
81 Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Thirty-second. These defendants, in answer to the thirty-second cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the thirty-second cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein men-

tioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Thirty-third. These defendants, in answer to the thirty-third cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the thirty-third cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks in the com-
82 plaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sum was paid by said First National Bank on account of the said checks was repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegations these defendants have no knowledge or information sufficient to form a belief.

Thirty-fourth. These defendants, in answer to the thirty-fourth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the thirty-fourth cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such
83 checks, and that whatever sum was paid by said First National Bank on account of the said checks was repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National

Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Thirty-fifth. These defendants, in answer to the thirty-fifth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the thirty-fifth cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

84 Thirty-sixth. These defendants, in answer to the thirty-sixth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the thirty-sixth cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants fully accounted for and paid over the same and the proceeds thereof to the said First National Bank of Albion; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Thirty-seventh. These defendants, in answer to the thirty-seventh cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as

aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the thirty-seventh cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks mentioned in the complaint was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by
85 these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and whatever sum was paid by said First National Bank on account of the said checks were paid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Thirty-eighth. These defendants, in answer to the thirty-eighth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the thirty-eighth cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank
86 of Albion, in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Thirty-ninth. These defendants, in answer to the thirty-ninth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned in the thirty-ninth cause of action in the complaint herein or endorsed or collected the same; and these defendants deny that said check or any of the checks mentioned in the

complaint was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same, if paid, were paid out of moneys so deposited with and paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and belonging to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sum was paid by said First National Bank on account of the said checks was repaid to said bank by the said Warner; and these defendants deny that by means of said check or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action; and these defendants deny each and every other allegation in said cause of action contained, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion; as to which allegation these defendants have no knowledge or information sufficient to form a belief.

Fortieth. These defendants, in answer to the fortieth cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore con-
87 tained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that the moneys, funds, and assets in the fortieth cause of action alleged or any part thereof were delivered to or received by these defendants from said Warner or applied or used for his benefit or credited to him, as in said cause of action alleged; and, further, these defendants say that if any of the moneys, funds, or assets referred to in said cause of action were in fact delivered to or received by them or were in fact the moneys, funds, or assets of the said First National Bank of Albion these defendants had no notice or knowledge of that fact; and these defendants deny each and every allegation in said cause of action stated, except the allegation that at the times therein mentioned said Warner was president of said First National Bank of Albion; in regard to the truth of which allegation these defendants have no knowledge or information sufficient to form a belief.

Forty-first. These defendants, in answer to the forty-first cause of action in the complaint mentioned, incorporate herein and make a part hereof the averments and allegations hereinbefore contained in their answer to the first cause of action herein, from the commencement thereof to and including the words "as president as aforesaid," in the 10th folio hereof, and deny that they received the check mentioned or set forth in the forty-first cause of action in the complaint herein or endorsed or collected the same or that said check is a copy of any check delivered to or received by these defendants; but these defendants deny that said check or any of the checks in the complaint mentioned was paid by said First National Bank of Albion or out of any moneys belonging to it or furnished by it, and say that the same were paid out of moneys so deposited with and

paid to said Third National Bank by said Warner or by these defendants, as before mentioned, and out of moneys of and be-
88 longing to said Warner and furnished by him for the purpose of meeting such checks, and that whatever sums were paid by said First National Bank on account of the said checks were repaid to said bank by the said Warner; and these defendants deny that by means of said checks or otherwise they received from said Warner or applied to his use, account, or benefit in any way or manner any moneys, securities, assets, or funds of the said First National Bank of Albion, as alleged in said cause of action, and also deny that any sums of money, checks, funds, or assets in said complaint mentioned were received or obtained by these defendants from said Warner with knowledge that he was using or attempting to use the moneys, funds, or assets of said bank for his own private purposes, and deny that they had any knowledge or notice that any moneys, funds, assets, or checks received by these defendants from said Warner or moneys collected on such checks were fraudulently misapplied or misappropriated by said Warner; but these defendants allege that all moneys, funds, assets, or securities delivered by said Warner to them or received by them from him and credited to said *Warren* or applied to his use or benefit were received by them in good faith and in the belief that said moneys, funds, assets, checks, or securities were the property of the said Warner or of other parties interested and represented by him, and that the said Warner had right and authority to apply the same, and that the same were rightfully and properly used and applied by these defendants in accordance with the directions of said Warner; and these defendants further say that for all moneys, funds, assets, or checks received by them from said Warner these defendants parted with and gave full value, and these defendants deny that they used or applied for the benefit of said Warner any of the moneys, assets, funds, or securities of said bank, and they deny each and every allegation in the last paragraph or article of said complaint in folio 129 to the end of the complaint, commencing with the words "and the plaintiff further alleges," ex-
89 cept the allegation that moneys received from Warner were credited to said account.

Forty-second. These defendants, further answering therein said complaint and the several causes of action contained and the allegation in said complaint commencing with the words "This plaintiff further alleges," in the 129th folio, and extending to the close of the complaint herein, deny that they ever received or applied to the use or benefit of said Warner any sums of money, checks, funds, or assets in the complaint mentioned with knowledge that the said Warner was using or attempting to use the moneys, funds, or assets of said bank for his own private purposes; and these defendants deny that they had any knowledge or notice that any moneys, funds, assets, or checks received by these defendants from said Warner or moneys collected on such checks were fraudulently misapplied or misappropriated by said Warner; but these defendants allege that all moneys, funds, assets, or securities delivered by said Warner to

them or received by them from him and credited to him or applied to his use or benefit were received by them in good faith and in the belief that the same were the moneys, funds, assets, checks, and securities of the said Warner or of other parties interested with and represented by him, and that the said Warner had right and authority to apply and use the same and that the same were rightfully and properly used and applied by these defendants in accordance with the directions of said Warner; and these defendants further say that for all moneys, funds, assets, or checks received by them from said Warner these defendants parted with and gave full value; and these defendants deny that they used *used* or applied for the benefit of said Warner any of the moneys, assets, funds, or securities of said bank, and they deny each and every allegation in the last paragraph or article of said complaint in folio 129 to the end of the complaint, commencing with the words "And the
90 plaintiff further alleges," except the allegation that moneys received from Warner were credited to said account, and allege on information and belief that none of the checks in the complaint mentioned were paid out of the moneys, funds, or assets of the First National Bank of Albion, and that these defendants did not receive or apply to the use of said Warner any moneys, funds, or assets of the said bank, and that all moneys, funds, and assets of said bank which at any time came into the hands of these defendants and the proceeds, if any, thereof were accounted for and paid over by these defendants to said bank.

BURRILL, ZABRISKIE & BURRILL,
Defendants' Attorneys.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Eugene R. Washburn, one of the defendants, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EUGENE R. WASHBURN.

Sworn to before me this 13th day of March, 1885.

DAN'L RUMBOLD,
[SEAL.] *Notary Public* (74), *N. Y. Co.*

91 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 16th day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Wm. J. Wallace, circuit judge.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion,
vs.
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURNE.

Now comes the plaintiff, by William A. Beach, Esq., his attorney, and moves the trial of this cause. Likewise come the defendants, by Burrill, Zabriskie & Burrill, their attorneys. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Wednesday, April 25, 1888, the jury retire, and on their return render a verdict whereby they find for the plaintiff in the amount of $147,759.71.

It is ordered that the defendants have a stay of proceedings on said verdict for thirty days from April 25th, 1888.

It is further ordered that, after the argument of the motion for a new trial herein, the defendants have a further stay of proceedings pending the decision on said motion for a new trial.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

92 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States court-rooms, at the post-office building, in the city of New York, on the 13th day of August, 1888.

Present: Hon. William J. Wallace, judge.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion, Plaintiff,
against
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURN, Defendants.

A motion having come on to be heard for an order setting aside the verdict rendered on the trial of this action and for a new trial herein upon the case made herein—

After hearing John E. Burrill, Esq., and Elihu Root, of counsel for defendants, in support of said motion, and George W. Wingate, Esq., of counsel for plaintiff, in opposition thereto—

Now, on motion of Wm. A. Beach, attorney for plaintiff—

It is ordered that the said motion to set aside the verdict and for a new trial be, and the same hereby is, in all respects denied.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. Henry J. Anderson, as receiver, etc., *vs.* Samuel H. Kissam &
93 o'rs. Order denying motion for new trial. William A. Beach, attorney for plaintiff, office of Wingate & Cullen, 20 Nassau street, N. Y. city. U. S. circuit court. Filed Aug. 13, 1888. John A. Shields, clerk.

94 Circuit Court of the United States for the Southern District of New York.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion, Plaintiff,
against
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURNE, Defendants.

The issues in this action having been brought on for trial before Honorable William J. Wallace, judge of this court, and a jury, at a trial term of this court held on the first Monday of April, 1888, and the issues having been tried and a verdict for the plaintiff having been duly rendered on the twenty-fifth day of April, eighteen hundred and eighty-eight, for the sum of one hundred and forty-seven thousand seven hundred and fifty-nine and $\frac{71}{100}$ dollars, and the plaintiff's costs and disbursements having been adjusted at one hundred and fifty-nine $\frac{3}{100}$ dollars, and the interest on the verdict having been computed at three thousand five hundred thirty-seven $\frac{58}{100}$ dollars:

Now, on motion of William A. Beach, attorney for said plaintiff, it is—

95 Adjudged that said plaintiff, Henry J. Anderson, as receiver of the First National Bank of Albion, recover of said defendants, Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburne, one hundred and forty-seven thousand seven hundred and fifty-nine and $\frac{71}{100}$ dollars, found by the jury, with three thousand six hundred & ninety-six & $\frac{61}{100}$ dollars, costs, disbursements, and interest on verdict, making in all the sum of one hundred and fifty-one thousand four hundred and fifty-six & $\frac{32}{100}$ dollars.

Judgment signed this 18th day of September, 1888.

G. E. ROGERS,
Deputy Clerk.

(Endorsed:) Circuit court of the United States for the southern district of New York. Henry J. Anderson, as receiver of the First National Bank of Albion, *vs.* Samuel H. Kissam *et al.* Judgment-roll. Wm. A. Beach, pl'ff's att'y. U. S. circuit court. Filed Sept. 18, 1888. John A. Shields, clerk.

96 United States Circuit Court, Southern District of New York.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion,
against
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURN.

This cause came on to be tried before the Hon. William J. Wallace, circuit judge, and a jury, on the 17th day of April, 1888.

The plaintiff read in evidence the following papers:

Certificate of organization of the First National Bank of Albion, New York (marked Plaintiff's Ex. 1).

Articles of association of said bank (marked Plaintiff's Ex. 2).

Certificate of extension (marked Pl'ff's Ex. No. 3).

Amendment to articles of association (marked Pl'ff's Ex. No. 4).

Approval of the same by the Comptroller of the Currency (marked Pl'ff's Ex. No. 5).

Certificate of appointment of Henry J. Anderson as receiver of said bank (marked Pl'ff's Ex. No. 6).

It appeared by said exhibits that said bank was organized as a national bank under the general national banking act, ap-
97 proved February 25th, 1863, by a certificate dated December 5th, 1863, and filed December 22d, 1863; that the capital of the bank was fifty thousand dollars, consisting of five hundred shares of one hundred dollars each, with privilege of increasing the amount of stock to one million dollars; that the associates in said bank were R. S. Burrows, Lorenzo Burrows, Lemuel C. Payne, Henry L. Archilles, and William G. Swan; that the bank was reorganized under the act of July 12th, 1882, pursuant to the terms of which amended articles of association were duly filed, dated January 12th, 1883, which were signed by the executor of R. S. Burrows for 900 shares, Albert S. Warner for twenty shares, and R. Titus Coan for ten shares; and thereafter, on February 24th, 1883, said amended articles were approved by the Comptroller of the Currency and a certificate of reorganization of said bank was granted by him, dated on that day.

It further appeared that Henry J. Anderson was appointed receiver of said bank on or about the 26th day of August, 1884.

Plaintiff's counsel thereupon called as a witness R. TITUS COAN, who, being duly sworn, testified as follows:

I reside in Albion, in the State of New York, and was book-keeper in the employ of the First National Bank of Albion in 1878, or about that time, and was also acting teller, and continued as such book-keeper and acting teller until January, 1884, when I became cashier, and held that position until the close of the bank, August 21,
98 1884. At that time a Mr. Williams, a bank examiner, was sent by the Comptroller to take charge of the bank until the receiver was appointed. Plaintiff took possession of the bank as receiver on August 28, 1884, and has been in such possession since.

Warner was last known to be at Albion on the 13th of August, 1884. He has never been back since, to my knowledge. The First National Bank of Albion kept an account with the Third National Bank of New York City. It was a general account, the same as any country bank will keep with a New York bank. We sent currency, drafts for collection, drafts on New York, and such. I should judge it was quite a large account for such a bank. The capital of the First National Bank of Albion at the time of its failure was $100,000.

Plaintiff's counsel presented to the witness 13 checks, being the same set forth in the first thirteen articles of the complaint in this action, and the witness stated that the signature of Warner as cashier or president, thereto affixed, was in his handwriting. Defendants' counsel thereupon admitted that the endorsements "Bank of New York" and "Credit Kissam, Whitney & Co.," upon the checks referred to, are the endorsements of the defendants, and that they received the money on such checks by payments from the Third National Bank of New York, and that said moneys were credited to Warner in his accounts with them.

The said checks were read in evidence and marked Ex's 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19.

99 I first saw these checks at the bank after it was closed, in its vault. The habit of the Third National Bank was to return by mail to the Albion Bank the checks drawn upon it and its statements of account. It was the custom to send the statement first and the vouchers afterwards. The statements were sent once a month and the vouchers once in three months. I have examined the books of the bank, and I find that the draft for $706.08, marked Exhibit No. 9, was credited on the ledger of the Albion Bank to the Third National Bank of New York, on August 14, 1880. I know as a fact that reports from the Third National Bank were received monthly by the Albion Bank. These statements were never checked up by the Albion Bank because it was behind in its work, so that the books would not show any discrepancy between the two accounts. When the Albion Bank sent money to the Third National Bank it was charged to the Third National Bank. When we wanted money in ordinary business we drew on them by draft, and credited them with the amount when we drew. The Albion Bank would not transmit statements to the New York Bank, but the latter transmitted statements to the Albion Bank. We never compared the statements with our books to see if they were correct. Warner had a private account with the Albion Bank between 1880 and 1883.

Cross-examination:

The ledger of the Albion Bank containing its account with the Third National Bank of New York was produced. Said ac-
100 count began January 30th, 1880. Such account had existed since the connection of witness with the bank. The account prior to January 30th, 1880, was in another ledger. The account between the two banks continued till the close of the Albion Bank, in August, 1884.

The witness produced five sets of monthly statements furnished by the Third National Bank to the Albion Bank, covering the years 1880, 1881, 1882, 1883, and 1884, referred to by witness, and the same were read in evidence and were marked respectively A, B, C, D, and E. With these statements the Third National Bank would send their checks that had been cancelled and paid as vouchers for the credits to themselves and charges to the First National Bank.

The checks read in evidence were paid by the Third National

Bank in New York and remitted to the bank at Albion in the ordinary course of business. There is nothing to show on the books of the Albion Bank that either of the checks in suit, except that for $706.08, was paid. Had checks been paid by the Bank of Albion they would have been credited the same as the check for $703.08, and I have been unable to find any entry in those accounts of said checks. The checks on the Third National Bank in the account in the ledger of the Albion Bank are made from the cash book, and the cash-book entries were made from the vouchers themselves or from the stubs of the drafts or the vouchers, and not from the statements furnished by the Third National Bank. I have compared the statements furnished by the Third National Bank with
101 the account on our books at Albion. I found discrepancies between the accounts on our books and the statements of the Third National Bank. The discrepancies were that deposits made with the Third National Bank were not entered in the books of the Albion Bank. The statements furnished by the Third National Bank were found scattered all over. Some were missing, but were afterwards supplied by the Third National Bank. The bank had no regular teller. I acted as teller at times, and Warner also acted as teller. I drew drafts as teller and also as cashier. Drafts were also drawn by the president, vice-president, cashier, and teller, as the case might be. The book-keeper never signed drafts. If a person came into the Albion Bank while I was teller and said, "Here is $500; I want a draft on New York," I would take his $500 and issue him a draft signed by myself as teller, and when the same thing happened to the president or the cashier they would issue drafts in the same way, drawn by them as president or cashier. The Albion Bank had no other correspondent in New York except the Third National Bank. When a person procured a draft on New York in the manner before stated the draft would be entered, and no other entry was made.

The $500 received for such a draft would not be entered anywheres, but it would go into our cash. The cash book would be balanced, and it ought to show so much money on hand. The cash would be counted, and it would have to correspond with the
102 balance. It must balance if the money was paid into the bank for the draft. If money was taken for a draft but no entry made of it and the draft should be paid the Albion Bank would hear of it, in the ordinary course of business between the two banks, when the draft was returned. It would appear in the statement of the New York bank. Such return drafts were kept in the vault of the Albion Bank. All of us had partly charge of that vault. Mr. Warner had absolutely the charge of the vault and of the safe always. It was Warner's business to examine the monthly statements when they were returned, and his business to compare the vouchers returned to the Albion Bank with its books. The vouchers would be checked up to see if they corresponded with our entries. The entries in our ledger account with the Third National Bank were made from the cash book and from our voucher when the draft was issued. Roswell Smith Burrows, one of the original

associates of the Albion Bank, was president of the bank from its organization till his death. Lorenzo Burrows, a brother of R. S. Burrows, died since the bank closed. Samuel C. Paine and Henry L. Archilles are also dead.

In the amended articles filed on the 12th of January, 1883, the estate of R. S. Burrows, by Albert S. Warner, managing executor, signed for 900 shares; Albert S. Warner for 20 shares; R. Titus Coan for 10 shares; Louise C. Burrows and W. E. Smith were also stockholders in 1883 and up to the time when the bank closed.

103 There were five directors, namely, Louise C. Burrows, the widow of R. S. Burrows; Albert S. Warner, Clement Bliss, W. E. Smith, and myself. Bliss owned 10 shares; Smith owned 10 shares. Neither Smith nor Bliss were employed in the bank.

The board of directors met several times a year. When we met as directors we did not as a general rule examine the books of the bank or the cash. The bank examiner made an examination once a year. On such examination we examined the assets and counted up the cash and examined everything connected with the bank. He went into the vault, examined the cash, and also examined the books and the papers in the vault.

Q. On this examination made by the bank examiner was there any evidence, and if so what, furnished to the bank examiner with regard to the account in the Third National Bank and with regard to moneys in the Third National Bank?

Objected to by plaintiff's counsel as immaterial and incompetent.

Defendants' counsel stated that he wishes to show that there was in the possession of the Albion Bank, its officers and directors, some information or some means of information upon which they could draw when it became necessary for them to submit the condition of the affairs of the bank to the inspection of the bank examiner.

104 The COURT: All that is to be assumed unless we assume that the officers of the Albion Bank were parties to a scheme to defraud it. It is competent for you to show that the vouchers submitted by the Third National Bank to the Bank of Albion came under the observation of the directors of the Albion Bank.

Objection sustained. Defendants' counsel excepted.

I took some part in the examination of the affairs of the bank at the time when the official examiner was making his investigation. I sometimes helped him to count the cash, or I got the cash and put it before him so that he could count it. I don't think I ever went over the books with him, but the books were open to him for his inspection. The bank examiner always took up the statements of the New York account to compare with the cash, and these statements were furnished to him. I don't know whether he asked for vouchers or not; he did not ask me. I don't know whether any vouchers were exhibited to him of any of these amounts; the statements would show everything.

Witness examines the statements Exhibits A, B, C, D, and E, and

states that the following items are therein credited to the First National Bank of Albion and are also entered on the books of said bank on its ledger account with the Third National Bank of New York, viz: 1880, Oct. 6, Davenport & Co., $4,480; 1880, April 27, $8,000; 1883, November 21, $8,000; (which is entered as follows: December 29, 1883, deposit by K., W. & Co., Nov. 21, 1883;) 1883, Dec. 31, $7,850; 1883, Nov. 15, $4,000; entered under date of December 29, 1883, as paid by Kissam, Whitney & Co., Nov. 15,
105 1883; also 1883, April 17, $6,000, which is a part of an item of $6,702 credited to the bank of Albion, composed of an order on Kissam, Whitney & Co., $6,000, and other drafts making up $6,702. The witness also states from such examination that the following items credited in said statements to the Albion Bank do not appear on its said ledger account: 1880, Oct. 16, Bank of New York, $14,000; 1880, Oct. 29, Merchants' Bank of Baltimore, $20,000; 1881, April 4, $8,000; 1881, April 14, $5,590; 1881, April 21, $9,200; 1881, June 30, coin, $5,000; 1880, August 24, $27,307.60; 1882, April 3, $10,000; 1883, March 7, $5,000; 1883, November 15, $4,000; 1884, March 7, $5,000; 1884, July 28, $8,000; 1884, July 28, $2,562.60.

Witness further states that the item in the statement, April 11th, 1884, $5,000, is not on the Albion Bank ledger, but there is under date of April 12, on the bank ledger $7,308.47, in which is included the $5,000 referred to.

The entry of $7,308.47 in the Third National Bank statement shows that it was sent from some place on the 11th, but does not show where it was sent. The result of it, however, is that our bank got a credit of $7,308.47, of which $5,000 was by this check.

C. N. Jordan was the cashier of the Third National Bank during the period covered by said statement, and subsequently B. L. Hutchins became cashier. The check now shown me for $5,000, dated April 11th, 1884, drawn by Kissam, Whitney & Co. on the Third National Bank to the order of A. S. Warner was endorsed:
A. S. Warner pay G. L. Hutchins, Esq., or order, for col-
106 lection; A. S. Warner, president; that endorsement is in the handwriting of Mr. Warner. I am acquainted with the stamp of the Third National Bank which was used by it instead of an endorsement on checks passing through their hands. The stamp on the several checks now shown me is the bank stamp of the Third National Bank. The checks are drawn by Kissam, Whitney & Co. on the Bank of New York and were paid and are credited to the Albion Bank in the statements furnished by the Third National Bank as deposited there by Kissam, Whitney & Co. The checks are dated and made payable as hereinafter stated and were read in evidence and marked as follows:

1884, April 11.—To the order of A. S. Warner, $5,000.

Marked Defendants' Exhibit F.

1881, April 4.—$8,000 to the order of the Third National Bank, credit First National Bank of Albion, N. Y.

Marked Defendants' Exhibit G.

1881, April 14.—$5,590 to the order of the Third National Bank

Marked Defendants' Exhibit H.

1881, April 23.—$9,200 to the order of the Third National Bank.

Marked Defendants' Exhibit I.

1882, April 3.—$10,000 to the order of the Third National Bank, credit First National Bank of Albion.

Marked Defendants' Exhibit J.

1883, March 7.—$5,000 to the order of the Third National Bank.

107 Marked Defendants' Exhibit K.

1883, April 17 —$6,000 to the order of the Third National Bank.

Marked Defendants' Exhibit L.

1883, November 15.—$4,000 to the order of the Third National Bank.

Marked Defendants' Exhibit M.

Same date.—$5,000 to the order of the Third National Bank.

Marked Defendants' Exhibit N.

1883, Nov. 21.—$8,000 to the order of the Third National Bank, credit First National Bank of Albion.

Marked Defendants' Exhibit O.

1883, Dec. 31.—$7,850 to the order of the Third National Bank, credit First National Bank of Albion.

Marked Defendants' Exhibit P.

1884, March 7.—$5,000 to the order of the Third National Bank, credit of First National Bank of Albion.

Marked Defendants' Exhibit Q.

1884, July 28.—$8,000 to the order of the Third National Bank, credit of First National Bank of Albion.

Marked Defendants' Exhibit R.

Same date.—$2,562.50 to the order of the Third National Bank, credit of First National Bank of Albion.

Marked Defendants' Exhibit S.

Checks marked Exhibits L, M, O, and P, amounting to $25,850, are entered on the books of the bank at Albion, and the

108 other checks, amounting to $63,352, were not entered there.

I do not know the firm of Davenport & Co. The Albion Bank had no dealings with them, to my knowledge. The Albion Bank had no dealings with the Bank of New York on or about October 16, 1880, to my knowledge. No transaction appears on the Albion Bank books in connection with the Bank of New York at that time that I remember or which could relate to an item of $14,000 under that date. I did not know the Merchants' Bank of Baltimore. The Albion Bank had no dealings with that bank, to my knowledge. I don't know of any transaction in which there could enter an item of $20,000 under date of October 29, 1880. The only entry in the Albion Bank books in relation to it in the ledger account with the Third National Bank is on page 41, under date of November 6. That entry is "Deposited by A. S. W. $20,000," and by it that amount is charged against the Third National Bank. The entry in the statement furnished by the Third National Bank is October 29, 1880, acc. Warner, $20,000. The entry on the Albion Bank

books was not made until November 6, 1880. The item of April 27, 1881, $8,000, in the statement of the Third National Bank is as follows: "Currency, $8,000," and it is entered on the books of Albion Bank under date of April 26th, 1881, and is there charged to the Third National Bank as follows: "Currency by express, $8,000." There is also on the bank statement an entry June 30, 1881, $5,000, coin by cashier, which is not charged on the Albion books.

109 Albion Bank had no transaction or dealings with the Central Trust Company of New York on or about August 24, 1881, or at any other time, to my knowledge, or any transaction in which there could arise a credit of $27,307.60, to my knowledge. The bank at Albion, in the ordinary course of business, was in the habit of receiving as cash drafts from other banks drawn by the president or cashier of a bank in the country on a bank in New York. In New York they have what they call cashier's checks, which are different from a bank draft. They are marked cashier's checks. They are different. The usual mode of remitting money from Albion to New York and also from one part of the country to another is by purchasing a cashier's or president's draft on a bank in New York or elsewhere. This is true as to all banks in the State of New York. It is the ordinary and usual mode of remitting money from one section of the State to another, to do it by means of a president's or cashier's bank draft, drawn by the president or cashier of one bank upon a bank in the place where the money is needed.

On redirect examination the witness testified that the Burrows estate spoken of by the witness did business with the Bank of Albion. There were two accounts in its books with Warner—one as executor of the estate of Burrows, and the other as managing executor. Warner had transactions with the bank connected also with those estates. Warner was in the habit of opening the mails

110 received by the bank. There were two safes in the vault of the Albion Bank. Of the large safe no one had the combination except Warner. From 1873 until the failure of the bank, in 1884, no attempt was made to compare these returns made by the Third National Bank with the ledger account kept in Albion to know whether the ledger account was right or wrong. When the bank at Albion closed many of these returns were found not opened. The bank examiner, when engaged at the bank, sometimes asked Warner for the book in which the statements of the Third National Bank were, and they were given to him. I suppose that was always done. The bank examiner would simply examine the statement for the month in which he took the examination. I never saw him go through them and check them off. If he had checked them he would have found a discrepancy right away.

Q. At the time of the failure of the bank, please state to the jury how much Mr. Warner was indebted to it.

Objected to by counsel for defendants as incompetent, immaterial, and irrelevant.

Counsel for plaintiff states that he proposes to show that Warner was in debt to a very large amount, and that he did not credit spe-

cifically any money on any particular account, and consequently, as he failed to do it, the receiver can do it; that he proposed to show that Warner had drawn for his own use the moneys of
111 the bank from the Third National account to a much larger extent than was represented by these checks which he paid to Kissam, Whitney & Co.

The court overruled the objection, and counsel for defendants excepted.

A. I can't tell the exact amount. It was considerable. The checks now shown are drawn by Warner as cashier or president, are not entered in the books of the Albion Bank, were drawn on and paid by the Third National Bank and appear in its statement, and are dated and payable as follows:

The checks were offered in evidence, and objected to by defendants' counsel as irrelevant, immaterial, and incompetent. Objection overruled. Defendants' counsel excepts.

1881.—Check dated New York, January 26, 1881, to the order of J. Van Voorhis, for $100.

Marked Plaintiff's Exhibit 21.

Check dated New York, July 5, 1881, to the order of George B. Church, for $5,000.

Marked Plaintiff's Exhibit 22.

Check dated February 12, 1883, to the order of A. B. Warner, for $465, and endorsed to the order of G. L. Hutchins, cashier.

Marked Plaintiff's Exhibit 23.

Check dated New York, March 6, 1883, to the order of William M. Pritchard, for $10,000.

Marked Plaintiff's Exhibit 24.

Check dated New York, April 7, 1883, to the order of William M. Pritchard, for $3,500.

Marked Plaintiff's Exhibit 25.

112 Check dated New York, March 29, 1883, to the order of C. S. Cady, for $2,596.97.

Marked Plaintiff's Exhibit 26.

Check dated Albion, New York, January 22, 1884, to the order of F. Sidway, cashier, for $20,128.33.

Marked Plaintiff's Exhibit 27.

A good many of these statements furnished by the Third National Bank were missing when Warner left.

On recross-examination the witness testified:

There is a check, I believe, for every item debited to the First National Bank of Albion in the account furnished by the Third National Bank. All the checks drawn on that account are entered up and returned by the Third National Bank to the First National Bank at Albion.

EUGENE R. WASHBURN, called as a witness for plaintiff, testifies as follows: I am one of the defendants. Defendants are bankers and brokers in New York city, and a part of their business was to

buy and sell stocks and deal in securities on the stock exchange. Warner opened an account with us about May 11, 1880; he was a customer of Chase, Atkins & Co., who went out and stopped business. We took their business and went on. His account extended to July or August, 1884. The first entry on the credit side of the account is as follows: "May 12, 1880, rem. 11th, $10,000." That remittance was made by the check, Exhibit No. 7, and was received as a margin upon stocks. At that time we received from Chase & Atkins
113 the stocks held by them for Warner and paid the amount due them. We paid Warner's account and took the securities. This is the entry of such securities: 500 Lake Shore, 300 Canada Southern, 1,200 Western Union, 40.000 M., K. & T. bonds, 500 Northwest, 200 Wabash, 1,200 M., K. & T. seconds, 600 St. Paul, 200 Northern Pacific preferred, 50,000 C., C. & I. C. income bonds, 31,900 Chesapeake & Ohio currency bonds. We received them from Chase & Atkins at $348,086.19, which we paid them. Warner was entitled to the securities if he paid us that amount. The ordinary rule with our firm was that a customer should have ten per cent. margin. When we called upon him for $10,000 that indicated that the amount was necessary to bring the margin up to ten per cent. The ten per cent. margin is based on the par value of the securities, but that was not a cast-iron rule. Between the opening of his account and June 10, 1880, when his account was credited with $5,000, we had bought and sold stocks, but I cannot tell with what result. The first balance struck in our ledger in this account was June 22nd, 1880, at which date he had to his credit $10,279.49, and had no stocks, and was short 800 New Jersey Central. All of the stocks had been sold or taken up between June 9, 1880, and June 22, 1880. There was about seventy-five purchases and seventy-five sales up to June 22, 1880.

Q. Deduct everything that is put in the account for book-keeping purposes and state the aggregate of those seventy-five transactions.

114 A. There is a deduction to be made of nearly $400,000. The amount of actual transactions between these dates was $840,000, which includes the $348,086 which we paid Chase & Atkins. The next balance was struck July 15th, 1880, at which time the balance of the account was $3.41. He had on hand 800 shares Consolidated Virginia. The next balance was November 6th, 1880, when the balance to his credit was $8,849.90. There had been a number of transactions of buying and selling stocks between June 22, 1880, and November 6, 1880, and other dealings with him—a number of transactions. The next balance is November 19, 1880, at which time the account was closed, and we sent him by express $8,180.74, which balanced the account on the 18th of November. The account was opened again on December 15 by the receipt of $4,000. On December 23, 1880, he was in debt $12,800 against 200 Canada Southern and 100 Western Union and 200 Arizona. Between December 23 and January 10th, 1881, we had bought and sold stocks for him. The balance was struck December 31st, 1880,

at which time he owed $76,340.03 and had on hand 400 Canada Southern, 200 Arizona, and 700 Western Union.

Q. State the aggregate purchase and sale of stocks made by you between January 1st, 1881, and February 1st, 1881.

Objected to by defendants' counsel as irrelevant. Objection overruled, and exception by defendants' counsel.

A. About 12,000 shares. I am not able to state whether
115 there had been a loss.

Q. How did the account stand on the 26th of March, 1881?

Objected to by defendants' counsel as immaterial, irrelevant, and improper. Objection overruled. Defendants' counsel except.

A. We had advanced him $117,000 against his securities on hand. I don't know what his margin on those securities was. I have no way of getting at it. The inference to be drawn from the fact of our receiving these checks from Warner is that he had been requested to put up additional margin. The next balance is August 26th, 1881, when he was in debt $129,000 against the securities we had on hand, of which I cannot now tell the amount. The next balance on the account with Warner is December 31st, 1881. Between August 26th, 1881, and the close of the year he had eleven or twelve transactions. At the close of the year, December 31, 1881, he owed us $128,700 against the stock he had on hand. The various checks which we gave Warner, which have been introduced in evidence, and which were deposited in the Third National Bank to the credit of the First National Bank of Albion, were given and deposited by Warner's directions; but whether written or verbal I cannot tell. Between May 11, 1880, and August 26th, 1881, Warner deposited with us moneys otherwise than by draft on the Third National Bank and entirely outside of the stock transactions. I do
not know whether he was managing director of the Burrows
116 estate during the period covered by these checks. We did not have an account with him as managing executor until some time in 1883.

On cross-examination the witness testifies as follows: I was connected with the firm of Chase & Atkins from 1875 to May, 1880, at which time it went out of business and turned over this account of Warner's to our firm, and we took it as it stood on their books, took the securities and paid the $348,086.19 for which that firm held them. Between May 11, 1880, and August 26th, 1881, we received moneys from Warner aside from moneys derived from the proceeds of the sales of stock in our transactions with him, and during that same time we paid out on his account moneys totally disconnected from stock transactions. We had but one account with him, in which were entered all money- received from him and paid out for him or for his account. The checks introduced by plaintiff marked 7 to 19, inclusive, were received by us and placed to Warner's credit on his general account. Moneys that we paid and charged to him were always paid on the general account. Warner was in the habit of drawing drafts on us. If they were small drafts we paid

them in currency; if they were large drafts we paid them by checks on the Bank of New York. In all cases where we paid by check it was by check on the Bank of New York. When the accounts were balanced between us and Warner we returned him the drafts drawn on us. These drafts specified to whom the draft was to be paid, and the checks we drew were drawn to the order of the party mentioned in the draft or to the proper endorsee of the
117 drafts, if they were endorsed. Some of the drafts directed us to pay the money "to the Third National Bank to the credit of the First National Bank of Albion"—in that form—and in such cases we followed that language. Some of the checks drawn by us were to the Third National Bank and some to the credit of the First National Bank of Albion. All such checks were in pursuance of the terms of the drafts drawn by Warner. We made other deposits in the Third National Bank by direction of Warner. The nine checks in evidence marked Exhibits F to S, inclusive, payable to the Third National Bank to the credit of the First National Bank of Albion, were drawn pursuant to the terms of Warner's drafts on us or in pursuance of his personal directions. The drafts on us came by mail directly from Warner and through other parties to whom he had sent them, and sometimes through some bank.

The checks now shown me are drawn by our firm on the Bank of New York and delivered to the party to whose order they are drawn, and were paid by our bank in the ordinary and usual course of business, and are charged to Warner in our account with him.

Deefendants' counsel thereupon read in evidence the checks, dated and payable and for the amounts following:

Date.	To the order of—	Amount.	Exhibit.
1880.			
July 16	D. C. Hyde	$187 27	T
August 2	Laidlaw & Co.	503 25	U
August 16	Laidlaw & Co.	512 20	V
118			
September 28	First National Bank	1,000 00	W
September 28	Nevada Bank	505 00	X
October 1	Fourth National Bank	915 62	Y
October 30	D. M. Plumb	1,000 00	Z
November 8	Third National Bank	290 00	A 1
November 8	Fourth National Bank	1,104 33	B 1
December 17	Nevada Bank	2,006 00	C 1
December 17	National Park Bank	2,000 00	D 1

Date.	To the order of—	Amount.	Exhibit.
1881.			
January 25	Bank of New York, N. B. A.	30,060 00	E 1
February 10	B. M. Plumb	300 00	F 1
March 1	American Exchange Nat. B'k	500 00	G 1
March 12	Voorhees & Imbris	350 00	H 1
April 12	National Park Bank	2,000 00	I 1
April 27	American Exch. Nat. Bank	369 83	K 1
April 27	Wells, Fargo & Co.	500 00	J 1
June 11	First Nat. Bank, N. Y.	2,000 00	L 1
June 11	Wells, Fargo & Co.	2,250 00	M 1
June 20	B. M. Plumb, pres't	1,100 00	N 1
August 24	National City Bank	10,000 00	O 1
September 7	M. S. Nichols & Co.	1,000 00	P 1
September 10	Fourth National Bank	590 83	Q 1
September 27	First National Bank to cr. First Nat. B'k, Santa Fé.	1,000 00	R 1
September 30	National City Bank	10,455 00	S 1
October 28	F. A. Brown, treasurer	1,140 00	T 1
1882.			
February 16	Gallatin Nat. Bank	1,780 00	U 1
February 21	Chase National B'k	600 00	V 1
119			
March 23	Chase National Bank	782 07	W 1
July 22	National City Bank	969 51	X 1
1883.			
February 16	Wells, Fargo & Co.	729 15	Y 1
April 16	H. A. Mott, ex'r	250 00	Z 1
September 19	Fourth Nat. Bank to cr. Orleans Co. B'k.	7,500 00	A 2
November 21	Importers' & Traders' Nat. B'k	410 00	B 2
1884.			
January 24	Importers' & Traders' Nat. B'k	478 00	C 2
March 7	C. S. Cady	2,000 00	E 2

Q. Look at the check now shown you and dated October 15, 1880, for $14,000, drawn on the Bank of New York, payable to the order of C. N. Jordan, purporting to be drawn by Albert S. Warner, and state whether it is signed by Warner and whether it was paid to the Third National Bank.

A. The check is signed by Warner; the payee of the check, C. N. Jordan, cashier, is cashier of the Third National Bank, and it bears the bank stamp of payment used by the Third National Bank.

Defendants' counsel offers the said check in evidence which is entered in the statement of the Third National Bank to the credit of the First National Bank of Albion.

Objected to by plaintiff's counsel as irrelevant and immaterial. Objection sustained. Defendants' counsel excepts.

(The witness continues): When this account was trans-
120 ferred to defendants they were informed by Mr. Chase, one of the firm of Chase & Atkins, that other persons besides Warner were interested in the account. Chase stated that when Warner opened or proposed to open the account he said that he was acting with others, or that others were acting with him; that Warner told him that. He (Chase) told us that just before the account was transferred to our firm and with a view to our succeeding them in their business. I believed the statement of Chase to be true, and in our dealings with Warner acted on that assumption. The checks in suit were received by defendants in good faith, and they parted with their money on the faith of such checks when they were received and in the full belief that they had been properly obtained from the bank at Albion by Warner. Warner made a statement to Mr. Whitney, one of our firm, in regard to other persons being interested with him in the account, and this was communicated to me by Mr. Whitney. I had no conversation with Mr. Warner himself on the subject.

The following checks drawn by defendants and charged in Warner's account are for currency or coin sent to Warner by his directions. Said checks are read in evidence and marked as exhibits and are dated and for the amounts following—that is to say:

Check November 1, 1880, $5,000, was currency sent to Warner by express and so charged in the account.

Said check is marked Defendants' Ex. F 2.

Check November 18, 1880, $8,180.74, was gold remitted to
121 him and so charged.

Said check is marked Defendants' Ex. G 2

Check of November 19, 1880, $5,751.52, was remitted in coin and currency to him by express and so charged.

Said check is marked Defendants' Ex. H 2.

Check of April 29, 1881, $5,000, was paid on his draft.

Said check is marked Defendants' Ex. I 2.

Check of March 28, 1882, $5,000, was currency sent by express and so charged.

Said check is marked Defendants' Ex. J 2.

Check of February 17, 1883, $9,000, was currency sent to Warner by express.

Said check is marked Defendants' Ex. K 2.

Check of October 25, 1883, $7,990, was paid on Warner's draft.

Said check is marked Defendants' Ex. L 2.

All the drafts for which these checks were given were returned to Warner.

J. B. Hamilton, named in the checks now shown me, was my assistant, and the checks now shown were drawn to his order and were

used on Warner's account and by his direction and for the purposes stated. Said several checks were read in evidence and marked as exhibits as follows—that is to say:

Check August 10, 1881, $229.80; $65 of this amount is charged in Warner's account.

Check is marked Defendants' Ex. M 2.

Check August 15, 1881, for $1,140, was in payment of a draft by Warner.

122 Said check is marked Defendants' Ex. N 2.

Check September 17, 1881, $10,000, in payment of two drafts by Warner, $5,000 each.

Said check is marked Defendants' Ex. O 2.

Check August 9, 1882, $465, in payment of Warner's draft.

Said check is marked Defendants' Ex. P 2.

Check September 22, 1882, for $1,522.75, "paid A. S. Warner's note and interest." That was endorsed payable to the Central National Bank.

Said check is marked Defendants' Ex. Q 2.

Check September 19, 1883, for $2,500, in payment of a draft by Warner.

Said check is marked Defendants' Ex. R 2.

Check February 23, 1884, $500, in payment of a draft.

Said check is marked Defendants' Ex. S 2.

Check August 12, 1884, $1,785.62, is for currency sent by express.

Said check is marked Defendants' Ex. T 2.

The check of January 25, 1881, $30,000, marked Ex. E 1, payable to the order of the Bank of New York, was given by us for a loan of $30,000 made by that bank to Warner. We paid that loan by that check. That loan was made on the 15th of October, 1880, and the check of $14,000, of October 15th, 1880, which has just been offered in evidence, was a part of that loan and was deposited in the Third National Bank to the credit of the Albion Bank. The checks now shown, drawn by Warner on the Bank of New York,

123 are one dated October 15th, 1880, for $6,000; the other two, dated October 30th, 1880, for $8,000, both payable to the order of defendants, were received by them from Warner and are credited to Warner in his account. These last two checks are also a part of the loan of $30,000 made by the Bank of New York, as above mentioned. During the period covered by our account with Warner no question was ever raised by the Third National Bank or any one else in regard to any of the checks in suit. I never heard of any question being raised in regard to any of these checks. I have been connected with the business of bankers and brokers since February, 1864. During that time checks or drafts like those introduced in evidence here and drawn by the president or cashier of a bank out of the city on a bank in this city or another place have been used as the ordinary and usual mode of remittance of money. Such checks and drafts, according to the custom and uses of the business, are received and treated as cash items. It is not usual or customary to make application to a bank by whose officers such

check is drawn to ascertain whether it be drawn by authority or not.

The statements of our account with Warner were sent to him at Albion, New York, and when we acknowledged remittances by him that acknowledgment of remittances was sent to the same place.

On redirect examination the witness stated that he made the check to take up the loan of $30,000 made by the Bank of New
124 York to Warner, and got the securities from that bank and remitted them to Warner by his directions.

Plaintiff's counsel offers in evidence the account from the ledger referred to by the witness containing the account with Warner between May 11, 1880, and August 27, 1881. Defendants' counsel objects as immaterial, irrelevant, and incompetent. Objection overruled. Defendants' counsel excepts. By direction of the court it was considered as read in evidence, with leave to counsel to refer to such parts thereof as he wished.

HENRY J. ANDERSON, the plaintiff, testified as follows:

I am an expert accountant. I have been ten years receiver of national banks, and also an accountant, and was employed lately on the United States Pacific Railway Commission as an expert accountant. I took possession of the First National Bank at Albion August 28, 1884, as receiver. That bank had one vault, which was shelved into compartments. There were two safes in the vault; they were all open.

Q. Had it been necessary to break open any of these safes? What was the fact in regard to that?

Objected to by defendants' counsel as irrelevant, immaterial, and improper. Objection overruled. Defendants' counsel excepts.

A. Of the smaller safes in the interior of the vault the combination had been chipped off, and the vault was opened by expert mechanics. I saw Warner at St. Catherine's, Canada, where
125 I called upon him as receiver. The capital of the bank was one hundred thousand dollars. According to its books, it had a nominal surplus of twenty thousand dollars. I made investigations of the affairs of the bank.

Q. From such investigation, what was the amount of the defalcation, if any, by Warner as an officer?

Objected to as immaterial, irrelevant, and incompetent. Objection overruled. Defendants' counsel excepts.

A. $350,000.

The whole difference between the Albion Bank and the Third National Bank in respect to this amount was eleven or twelve thousand dollars. The books of the First National Bank showed a credit to it of $5,000. The books of the Third National Bank showed a debit to the First National Bank of $7,000, which made a difference of $12,000.

On cross-examination the witness testified: I include in the amount of defalcation seven notes, amounting to $15,922.49 without interest, which I found in the bank. These notes were made in 1880, 1881, 1882, and 1884. I also included two notes made by Stewart & Warner, amounting to $10,000. I also included an overdraft in the book account of Albert S. Warner August 26, 1884, of $1,756.15. I also included Richmond, York River & Chesapeake second-mortgage bonds, $35,000. I also included $5,500 cash-book alterations of debits Oct. 27, 1887, charged to profit and loss account. At that date R. S. Burrows was president, Stewart was vice-president, and Warner was cashier.

126 The books show that the bank was in the habit of buying bonds. I don't know whether it was in the habit of buying stock also. I think there were some entries on the books of the purchase and sale of stock. I think I remember one, the Chesapeake and Ohio. I will not say positively whether it was stock or bonds, but that is my general recollection. In the amount of said defalcation I also included all checks drawn by Warner on the Third National Bank included in the statement of account of that bank and not charged on the books of the Bank of Albion between March 21, 1879, and August 24th, 1884, amounting to $253,273.18, which included the checks in suit, amounting to $104,106.00, and other checks amounting to $97,167.00, drawn by Warner for moneys used in various purposes, and other checks amounting to $10,000 and $42,000 respectively, drawn by Warner before the account with the defendants was opened. The balance of the ledger account with the Third National Bank, as kept in the books of the bank at Albion when closed, on the 23d of August, 1884, was $5,195.73 to the credit of the bank at Albion, which amount was transferred to the receiver's account. The statements of the same account furnished by the Third National Bank introduced in evidence show an indebtedness to it by the First National Bank at Albion of $5,134.12 on the 23d of August, 1884. The account has not been closed between me and the Third National Bank. I have not called upon the bank for payment, and it has not called upon me for payment of the balance. The account is closed

127 on the books of the First National Bank by a transfer to my ledger. The attention of the witness is called to an entry under date August 23d, 1884, in the statement furnished by the Third National Bank, on the credit side, as follows: "By assignment of claim G. L. Burrows, of Saginaw, Michigan, $5,134.12," and to the item on the debit side "$7,046.65," and to the fact that the account was closed August 23d, 1884. The Albion books show nothing about that. It is a settlement of the final account between the two banks. This occurred before I got there. All I know is what I have heard. It seems that just before the failure of the Albion Bank a balance was due on a loan obtained by Warner from the Third National Bank on securities claimed by the Burrows estate and on notes and bills receivable of the bank. On August 21, 1884, the Burrows estate paid the balance of the loan and took the securities. The account was thus closed, and the Third

National Bank got $5,134.12, which is the balance of their account. I have taken no steps to open that account. I have brought no action for that purpose or for the purpose of opening that settlement.

Q. Was it closed on the books of the Albion Bank?

A. I can't tell without seeing whether that entry was put on the books or not; I presume that it was. That was done prior to my going there. I included in my statement of Warner's defalcation two notes drawn by Warner August 24, 1878, and May 20, 1878,
128 each for a thousand dollars. All those notes which I have referred to, made by Warner or Stewart & Warner, were made payable on demand and in some form payable to the Bank of Albion. All these notes are charged on the books of the bank in the discount bills account. They were discounted by the bank; they were not credited to Warner. These notes were kept by the bank. I have examined but I cannot now tell whether the notes for $15,922.49, made by Warner in 1880, 1881, 1882, and 1884, or the two notes for $10,000 each, made in 1883 and 1884, referred to by me, were original notes or renewals of notes given before. I found the notes themselves; they are in my possession and are entered on the books of the bank under the head of discount bills account, and also in the cash book. My recollection of those two notes is that they are old note renewals. The overdraft of August 26, 1884, $1,756.15, before referred to, is the balance of Warner's ledger account when the bank closed. His account with the bank extended back at least ten years; perhaps more. In my said statement of Warner's defalcation I have assumed that all items not on the Albion books were checked out by Warner, and I have charged them against him, and I have charged him with all moneys which I could not otherwise account for. I said that the whole defalcation of Warner was $350,000; instead of that, it was $381,000; including the $20,000 check of George B. Church and another item of $10,000, made the indebtedness of Warner $350,000, leaving a margin of
129 $30,000. I did not include the item of $20,000 in the item of $253,000 of checks before given. I understood the question yesterday to be as to the indebtedness of Warner to the First National Bank, and I answered that it was $350,000.

The witness says that he has examined the books of the Albion Bank and the statements, Exhibits A, B, C, D, & E, and that he has prepared therefrom a statement showing the debits and credits in the account between the two banks, which appear on the books of the Third National Bank and are not entered on the Albion books, from February 1, 1880, to August 12th, 1884. The statement was read in evidence.

Statement showing debits and credits in account of the Third National Bank, New York city, in its account with First National Bank of Albion, New York, and not entered on books of the last-named bank, from Feb'y 1, 1880, to August 12, 1884.

DR.

1880.		
March 2	Chase & Atkins	$700 00
March 18	J. B. Manning	10,000 00
April 7	Chase & Atkins	5,000 00
April 19	Do. do.	5,000 00
May 8	Do. do.	14,000 00
May 13	Do. do.	5,000 00
May 13	Kissam, Whitney — Co.	10,000 00
June 11	Do. do.	5,000 00
August 14	Do. do.	706 08
December 24	Do. do.	8,000 00
130		
1881.		
January 12	Kissam, Whitney & Co.	5,000 00
January 15	Do. do.	10,000 00
January 15	Do. do.	15,000 00
January 19	Do. do.	10,000 00
February 1	Do. do.	10,000 00
February 5	Do. do.	5,000 00
March 28	Do. do.	5,000 00
August 11	Do. do.	10,000 00
August 29	Do. do.	10,000 00
August 20	5 M 4% bonds	5,787 50
November 18	Coin by express	10,000 00
January 19	Telegram order	9,000 00
January 28	A. S. Warner, cashier	100 00
March 2	Do. do.	300 00
1882.		
January 20	G. W. Worthington	200 00
April 5	G. B. Church	20,000 00
April 6	Do.	10,000 00
1883.		
January 8	Do.	10,000 00
March 7	W. M. Pritchard	10,000 00
1882.		
April 3	T. T.	2,596 97
April 9	Macy, O. & Tracy	304 30
1883.		
April 10	W. M. Pritchard	3,500 00
May 11	E. R. Hart	300 00
May 17	A. S. Warner, president	465 00
February 13	Do. do.	465 00
October 26	Do. do.	400 00

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1884.		
January 22	F. Sidway, cashier	$20,128 33
July 28	Frisbee Nore	607 35
July 28	G. M. Waterman note	567 00
July 28	Do. do.	1,010 50
August 4	Curtis Manufacturing Co.	2,545 20
August 4	W. D. King	350 00
August 4	Bardwell	900 00
August 4	C. T. Pritchard	1,232 00
August 4	Do.	248 46
August 4	Balance of loan	7,047 96
		$267,782 53
1880.	CR.	
May 6	City	$26,531 61
October 16	New York	14,000 00
November 23	1st Rich.	18,000 00
1881.		
January 21	4th National	4,500 00
July 1	Per A. S. Warner, to acc. A. S. Warner, ex'r	13,768 92
August 24	Central Trust Company	27,307 60
April 1	Kissam, Whitney & Co.	8,000 00
April 14	Per do. do.	5,590 00
April 21	do. do.	9,200 00
1882.		
April 3	do. do.	10,000 00
April 3	G. B. Church	20,000 00
November 3	J. B. Lightfoot	6,682 50
January 3	7,000 R'y R. & C. bonds	7,283 50

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November 18	Per A. S. Warner	6,627 98
1883.		
January 4	Am'n R. S. Co.	5,394 60
January 8	A. S. Warner, president	24,000 00
March 7	Kissam, Whitney & Co.	5,000 00
March 29	A. S. Warner, president	1,695 00
March 31	Do. do.	11,596 97
September 19	Coin by express	10,000 00
December 4	Kissam, Whitney & Co.	4,000 00
1884.		
January 3	Midlotheau, C. M.	5,000 00
March 7	Kissam, Whitney & Co.	5,000 00
July 5	J. B. Lightfoot	2,120 00
July 28	Kissam, Whitney & Co.	10,562 50
June 24	Loan	12,000 00
April 12	—— ——	7,308 47
		$281,169 65

This statement just read shows that there was deposited in the Third National Bank to the credit of the Albion Bank, between the periods covered by the statement, $281,169.65, which do not appear on the Albion books, and that there were paid out by the Third National Bank and charged against the Albion Bank, during the same period, $267,782.53, which also do not appear on the books of the Albion Bank; so that according to the books of the Third National Bank it had received $281,169.65 more than it had been charged with on the books of the Albion Bank.

In such statement I have included all the checks in suit, extending from May 11, 1880, to August 29th, 1881, and I have not
133 confined the charges to him to items of checks or drafts drawn by him as cashier or president of the Albion Bank on the Third National Bank. The sum of $267,782.53 includes all checks issued and signed by Warner as cashier or president, whether issued to Chase & Atkins, J. B. Manning, or the defendants in this action, and the several other parties I have named.

The account between the two banks extended back fifteen years, and the difference between the two accounts when the bank came into my hands as receiver was a claim by the Third National Bank that the Albion owed them about five thousand dollars and the claim by the Albion that the Third National Bank owed the Albion Bank about five thousand dollars. I made an examination of the papers and records of the Albion Bank which came into my hands as receiver, and I found quite a number of advices from the Third National Bank to the First National Bank—advices of remittances received and deposits made by defendants; some of them in the bank vault and some in other places. Those that I examined extended back probably about five years from the time of the failure. I did not examine any of the books of the Third National Bank. In some instances I compared these advices with the books of the Albion Bank. There were minutes of the meetings of the directors, and there was a record of the meetings of stockholders which went back to the organization of the bank. The bank was reorganized about the 24th of February, 1883.

Counsel for defendants here refer to and read in evidence as a part of their case the act of Congress of July 12, 1882, chapter
134 290, entitled "An act to enable national banking associations to extend their corporate existence and for other purposes," and call the attention of the witness to sections third and fifth, and thereupon the witness testified:

I do not find in the record of this bank any application made by a dissenting shareholder for an appraisal of the value of the stock. I never found any stock books or books containing blank certificates of stock. I found no stock account opened upon the books of the bank. I never looked to see whether the books of the bank showed that any of its capital stock had been paid in. I think nine shareholders held ten shares each, and the Burrows estate held all the rest.

On redirect examination witness said: Warner was the managing

executor of the Burrows estate towards the latter part; prior to that he was one of the executors. He had an account as such with the Albion Bank, and the estate was the main owner of the bank. I investigated, and was satisfied that the accounts which were rendered by the Third National Bank to the First National Bank were correct, so far as the amount received and paid out was concerned.

EUGENE R. WASHBURN, recalled by plaintiff, produced various letters from Warner to defendants, in which were enclosed the several checks in suit, except the check December 23, 1880, $8,000, and also produced letter-press copies of letters and telegrams from
135 defendants to Warner, some of which letters requested remittances and others acknowledged receipts of remittances and others gave Warner information as to the state of the stock market in answer to his request for such information.

Said letters and copies of letters and telegrams were read in evidence and marked as Exhibits 28 to 50, inclusive.

I have produced all the letters in our possession referring in any way to these drafts or checks offered in evidence, either by way of acknowledging their receipt or requesting their being sent, so far as I know.

We consider a cashier's check similar to those which have been marked in evidence in this case as currency in Wall street. We consider them as cash. We have some such checks on our books now. We have some such open accounts on the books now. We take such accounts. I cannot say that I know of any instance outside of our own firm. I mean to say that we have now among our customers more or less bank officers who are dealing in stocks on their own accounts and remitting by their own drafts on their own banks. We have accounts on our books to-day in which we have received from the parties checks drawn by them in their official capacity on transactions had by them individually. Of course I can't know of any other transactions of a similar character except those conducted in my own house, but I have heard of others—that is, of like transactions by other houses. It is not confined to my firm or to any particular firm in the street.
136 I can call to mind only two accounts of officials of institutions with our firm in which we are charging or crediting in individual stock accounts checks signed by them in their official capacity.

Q. You take those checks and credit those men with them?

A. We have no reason to suppose that there is anything wrong about it. Those men have been with us years and years and came down to us from the old house of Chase & Atkins in the same way in which Warner did, where Mr. Whitney and I were clerks. For about a year before the close of the business of Chase & Atkins we had a small interest in the business. Our duties were the same as they were before. Instead of a salary we received a certain interest, but Mr. Whitney and I were still clerks and continued to do clerical work during the whole continuance of the firm. The letters

entered in these letter books, and copies of which letters are introduced, are generally written on a printed form or blank and are usually written by the corresponding clerk in the office, and are signed by whichever one of the firm who happens to be there at the time. When a paper is brought to me prepared in this way I sign it just as I would sign a check which a clerk would bring to me, without stopping to think what was in the note or the check. It was usual and customary in our business to receive remittances of checks or drafts from other places unaccompanied by any letter. The mail was usually received in the morning by Mr. Whitney.

137 After the enclosures in the letters have been examined they are passed over to me. The defendants were in the habit of advising Warner from time to time of the purchases and sales of stock made on his account. We had a printed form of blank which we used for that purpose. Defendants were also in the habit of advising Warner of the amount of money from time to time deposited by him with them, or remitted to them, or which they had collected on his account, and which went to his credit. We had a printed form for that. When we deposited moneys in the Third National Bank to the credit of the Albion Bank we advised Warner of such deposits. In that case we wrote special letters. When we deposited moneys in the Third National Bank we sometimes got certificates stating that fact, such as the one now produced by plaintiff and shown me. These certificates are not negotiable, but are a mere memoranda. We were in the habit of remitting to Warner these certificates. I have prepared a statement showing the condition of our account with Warner at different times.

Paper read in evidence and marked Exhibit U 2, as follows:

Statement of Warner's Account.

Amounts received by defendants from Warner.	
May 11th, 1880, to June 22, 1880.	Balanced. All stock sold out and accounts closed, with the exception of 800 New Jersey Central; price, about 63, which would be about $50,000. To his credit, $10,297.49.
May 11, 1880, $10,000.	
June 9, " 5,000.	
138	
June 25, 1880, to July 15, 1880. Nothing.	Balanced. Stock closed out, except long 800 Virginia, worth $3 a share.
July 16, 1880, to Nov. 6, 1880.	Accounts closed entirely as far as stocks are concerned, showing simply money balance to his credit of $8,849.90.
Nov. 6, 1880, to Dec. 17, 1880. Nothing.	Balanced entirely, money and everything else.

Dec. 17, 1880, to Jan'y 1, 1881.		He had on hand 400 Canada Southern, 200 Arizona, 700 Western Union, worth $94,806.00, against $76,340.00.
Dec. 23d, 1880,	$8,000.	
Jan'y 1, 1881, to July 1, 1881.		He was long 100 Western Union, worth $9,000; 500 St. Joseph preferred, worth $58,500.
Jan'y 10, 1881,	$5,000.	He was short 800 Reading and 900 St.
" 11, "	10,000.	Paul and owed $42,900.
" 13, "	15,000.	Draft $10,000, Jan'y 24th, was used in
" 17, "	10,000.	paying loan Bank of N. Y. of $30,000.
" 24, "	10,000.	
Feb'y 1, "	5,000.	
March 25, "	5,000.	
July 1, 1881, to Aug. 27, 1881.		Long 1,000 St. Joseph ---- ---- $116,000
Aug. 9, 1881,	$10,000.	" 300 C. P. ---- ---- ---- 29,000
" 26, "	10,000.	" 100 M., K. & T---------- 5,000
		" 100 W. U.---------- 9,000
		$159,000
		Debit balance---------- 129,000
		Credit Warner ---------- 30,000

In answer to the court the witness said: The ledger account of the firm shows the commission account during the period cov-
139 ered by these checks, and the commission account will show the number of transactions.

On recross-examination the witness testified:

I recollect the bank panic of 1881. I think the calls made in January and February, 1881, were made during that bank panic; that is my recollection. It was a very sudden and bad panic, and the break in the stock market was very sudden, rapid, and severe. After that time, some time in February, I think, the market reacted; I can't tell at what particular time. The bulk of the money received from Warner from the first of January to the middle of February was during the bank panic. That is my recollection. Warner's account, when opened, about May 20th, 1880, to the close of the account, on August 27, 1881, never was as large as it was when opened. It was a decreasing account all the time. That was the general tendency of the account. The amount of money balance of the account between Warner and ourselves is not at all affected by the amount of short stock at the time the account is balanced or at any other time, for the reason that when stock is borrowed it is paid for and immediately charged to the person for whom it is borrowed; so that the money is in hand, and the amount charged to him on the closing out would be only the difference between what was paid for it and the market price on the day it was closed out. The whole amount of commission included in our account with Warner from beginning to end, when his account was finally closed, is a little less

than $7,000, which covers all our compensation for the entire account, from beginning to the close. The account was finally closed with Warner on August 12, 1884, and the balance remitted
140 to him by our letter of August 13th, 1884, which was read in evidence and marked Exhibit V 2.

Since August 12, 1884, defendants have had no transactions with Warner or received any money from or for him in any way, shape, or manner. Nothing has come into our hands for his account. I have before stated that the bonds received by us from the Bank of New York, on payment to it of the loan of $30,000 to Warner, were received by us and sent to Warner. They were sent to him in pursuance of a request in the letter now shown and read in evidence, dated February 23, 1881, marked Defendants' Exhibit X 2. Out of the 13 remittances or deposits which were the subject of this action, only six appear, so far as I can ascertain, to have been made in pursuance of calls made upon Mr. Warner, and the remaining seven appear to have been made without any demand upon him. One of the six was when we wrote to him to send $5,000 and he sent $10,000. Comparing the dates of our letters and the dates of the remittances, it appears that the responses when we called on him for money were prompt, as a rule. Of the amount of $103,706 sued for in this action, $53,000 came in response to calls, leaving $48,706 which came without being called for. Aside from the commissions and such proper interest charges as the defendants made for money that was loaned, they retained no portion of money which was remitted to or deposited by Mr. Warner. The commissions charged were the ordinary commissions charged in accordance with
141 the rules of the New York Stock Exchange. They are regulated by a rule of that establishment, and fixed *and* one-eighth of one per cent. That is the commission that we charged Warner in all instances, except, say, for a few mining shares, where the commissions were less than that, and it was not stock dealt in on the board.

On redirect examination, in answer to plaintiff's counsel, the witness said: It is not a fact that, in addition to the commission for buying and selling, the defendants charged Warner a commission on the balances; he was charged interest on his daily balances at the regular rates. The check for $10,000, January 24, 1881, Plaintiff's Exhibit No. 15, was sent to us to be used in payment of the loan at the Bank of New York, which we paid on the 25th day of January, 1881.

R. Titus Coan recalled by plaintiff's counsel:

Q. You have heard the testimony of Mr. Washburn where he read the letters from Mr. Warner, dated at Albion, August 13, 1884, acknowledging a shipment of currency of $1,700 odd *dollars;* was any of that money ever received by the bank?

Objected to by defendants' counsel as immaterial, irrelevant, and incompetent. Objection overruled. Defendants' counsel excepts.

A. I never knew anything about the receipt of the money; it

did not appear in the bank books in any way. Prior to the failure of the bank I was never notified of any deposits in the Third
142 National Bank, to the credit of the Albion Bank, of moneys not entered on the books of the First National Bank at Albion, except in the last deposit by defendants of $10,562; that came, as I remember, about the day that Warner went away, and it was opened afterwards, and showed that Kissam, Whitney & Co. had deposited so much money in the Third National Bank. I knew nothing about these checks in controversy.

Draft, Plaintiff's Exhibit 9, shown witness is the regular form of draft used in the First National Bank in its official business. When I testified that various officers of the bank, myself and others, were in the habit of drawing drafts I refer to this form of draft. At first we had a book in which such drafts were kept and from which they were cut out, but later on they were loose.

Look at Exhibits 8 and 19 and say whether there was in the possession of the Bank of Albion, to your knowledge, prior to its failure, a book out of which those two drafts might have been cut.

A. There was in the possession of the First National Bank a book in which are blank checks of the same stamp and style of those two checks; it was an old book. I never knew of any check book in the bank which contained checks like the other checks introduced in evidence. As a fact, these moneys transmitted by Warner to the defendants were transmitted by checks and not in the ordinary form of a draft by the Albion Bank upon the Third National
143 Bank; they could not use a bank draft without its being entered in the book. Prior to the failure of the bank I never received any of the deposit certificates produced by Mr. Anderson, which were sent by the Third National Bank when deposits had been made in it to the credit of the First National Bank, or any like those. Those referred to were found at Mr. Warner's house after the bank failed. I never saw them, except perhaps the last one that I testified to. I don't remember whether I saw the advice of the Third National Bank or not.

Q. In regard to the testimony which Mr. Washburn gave as to certain items of currency or cash or coin which he had remitted to Albion, was anything of that kind ever received, to your knowledge, by the First National Bank?

Objected to by defendants' counsel as immaterial, irrelevant, and incompetent. Objection overruled. Defendants' counsel excepts.

A. No; we never received any currency by express from Kissam, Whitney & Co. The bank never did, to my knowledge. I don't know of any of that coin or currency being received by the Albion Bank, or of any coin being received by that bank from Kissam, Whitney & Co.

The court, after discussion by plaintiff's counsel, ruled that the defendants were not entitled to the benefit of any moneys deposited by them by Warner's directions, or by other parties by like directions, in the Third National Bank to the credit of the First National Bank

of Albion, or to the benefit of any payments made by the defendants, or by other parties by direction of Warner, to the said Third
144 National Bank or to Warner for the account of the First National Bank of Albion; to each of which rulings defendants' counsel excepted.

There was no regular teller. There was no teller but myself after I went into the bank, in 1878, up to the time I became cashier. I performed all the duties of teller. Before that they were performed by Stewart, the vice-president—that is, he waited on customers and paid out money. In 1878, when I went into the bank, R. S. Burrows was president, Alexander Stewart was vice-president, and A. S. Warner was cashier and had been for some time. (Stewart was a son-in-law of Burrows.) On the death of R. S. Burrows, March 29, 1879, Stewart became president and Warner retained the position of cashier. I think Stewart died November 20th, 1881, after the last check in suit was sent to defendants. Warner became president and W. R. Burrows, a son of R. S. Burrows, became cashier, and continued as such until I became cashier, in January, 1884, and I continued as such until the bank closed, in August, 1884. Warner was not related to Burrows. Warner, Stewart, Louis C. Burrows, and William R. Burrows were executors of the Burrows estate; they were all directors of the bank. The elections were held in January. I was first elected director in 1882, to fill Stewart's place. I did not act as teller until after Stewart's death, in 1881. During his lifetime Stewart acted as teller; he waited on the counter and performed such duties; but he was in fact vice-president
145 and president. I did not become acting teller after Stewart's death; I was simply book-keeper. In 1880 and 1881 the directors were L. Burrows, Stewart, W. R. Burrows, Louise C. Burrows, and Warner; they were all executors of the Burrows estate except L. Burrows; he was a brother of R. S. Burrows. In 1879 R. S. Burrows, L. Burrows, Stewart, W. R. Burrows, and Warner were directors. After R. S. Burrows' death, in 1879, Louise C. Burrows took his place. During all the period covered by these checks in suit the entire board of directors of this bank, with the exception of L. Burrows, was composed of the executors of the Burrows estate, and all of the executors of the Burrows estate were directors of that bank during that period. The Burrows estate owned over nine-tenths of the entire capital stock of the bank. I was made stockholder of the bank when I was elected director. The real ownership of my stock was in the Burrows estate. Ten shares were issued to me to qualify me as a director. The Burrows estate owned 910 shares of the capital stock. At first, in 1878, I was not familiar with the books of the bank, because I did not know anything about book-keeping when I went there. In May, 1880, I was familiar with the books. There was no other book-keeper but myself. Warner helped on the books occasionally. Stewart never did. Stewart acted as teller, but made no entries of the checks he paid nor of the deposits he received. All the entries on the
146 cash book were made directly from the cash. A. S. Warner really managed the bank during the period referred to.

(The cash book of the bank is produced and the witness looks at it and says:) I think that I made most of the entries in the cash book during the years 1880 and 1881. The statements from the Third National Bank to the First National Bank of Albion had not been checked for several years before the time I went into the bank, in 1878. If the statements came when Warner was absent from home they were laid aside and never opened until he came home. A good many of them were found never to have been opened at all. The vouchers sent by the Third National Bank came sealed up by express, and they were put into the vaults of the bank. No one but Warner ever opened those packages, to my knowledge. We rarely compared the vouchers themselves. We would take up the statement and if the account balanced and there were no errors we took the account as correct. We did not know whether the books of the Third National Bank compared with ours; we supposed they agreed; they showed a balance all the while. We found out from our own books how much balance we ought to have. We never tried to ascertain whether their books showed a similar balance. After I became cashier I did not try to find out, because it would be six months' work, nor did it ever occur to me to find out whether the current balances corresponded. I had never been engaged in the banking business before that time. The account kept with the Third National Bank in New York was the only account we
147 had, and it was the largest and most important account that the Albion Bank had. The Albion Bank did not discount much paper or sell many drafts on New York. We generally kept the balance in the Third National Bank; it was twenty or thirty thousand dollars. Our ordinary deposits at home ran in the vicinity of $200,000. We sent paper to the Third National Bank for collection. We received advice from the Third National Bank as to remittances, deposits, and payments almost daily. They advised us of receipts and remittances, and they sent occasionally to us drafts for collection. When Warner was there the mails were passed over to him when they came into the office. When he was not there, after Mr. Stewart died, I opened the mail.

Q. Then, how did it happen that you never saw any of those statements from the Third National Bank?

A. I did not open them, as Warner was saying all the while, "We will start in here together and check up this New York account." There was nothing in the course of business to prevent me from opening the mails. I was at liberty to examine those statements. Warner spoke about being behind in the New York account, and said that he was going to hire an assistant to check up the New York account. He talked about this all along, soon after I became book-keeper. A good many accounts were not checked up, and he said that we would go to work and check them up, and we did check up other accounts. When he commenced talking about checking up this account I did not go on and check it up
148 because I had no time. It was his business to check it up in the first place, and I was busy with the books and everything, correspondence, remittances, and such. R. S. Burrows used

to check up the New York account when he was alive, as I understand; then it was left afterwards to Mr. Warner. I don't know whether W. R. Burrows opened the mail while he was cashier or in Warner's absence; he did not do it, to my knowledge. Later on I opened the mail myself when Warner was away. While W. R. Burrows was cashier he was not at the bank very much. He soon afterwards went into business in Boston, and that was the reason of his resigning as cashier. I presume that from November, 1881, to January, 1884, a few months would cover the whole period that he was there at the bank. He was there off and on. No one in particular did his work; we divided the work among ourselves. I was acting as teller and W. R. Burrows was the non-acting cashier, and the duties of the bank were generally divided up without much relation to the duties of the officers. My impression is that Warner was not away a great deal of the time. While Warner was absent in Richmond and New York, in 1880 and 1881, Stewart was at the bank. We had no other account except with the Third National Bank in which we received vouchers or received statements. I don't remember how we found out whether collection items were credited or not. The bank to whom the remittance was made always informed us whether the paper was received, irrespective of the monthly statements. It would come to our knowledge, but I can't tell you now how it came. I learned it from the
149 daily advices from the Third National Bank or from memoranda. If an item was paid it would be entered on the collection tickler as paid, and we would enter it up from that; but who marked it paid, I don't know. I opened the letters and saw the advices, and if they were entered on the collection tickler we would mark them as paid. I never opened letters when Warner was there; when he wasn't there, later on, I did. During the whole time of my connection with the bank Warner was considered as the manager of the bank. He was put there by the Burrows estate to manage that bank, and they all had entire confidence in him, as far as I know. During this period covered by these checks the bank paid dividends regularly, except they may have omitted them once or twice. I have no recollection of this omission, so I don't remember now. I think they paid three and one-half per cent. semi-annually right along from 1878 to 1884. Regular reports were made to the Comptroller of the Currency, and the usual quarterly reports, sworn to by an officer of the bank. I never swore to any of the reports while I was cashier. Warner always swore to them while Burrows was cashier and while he was cashier. I remember the examination made at the time of the extension of the bank charter, January, 1883, by a special bank examiner from Washington.

Plaintiff's counsel offers in evidence statement of interest claimed on money in suit, upon each sum, from the time defendants received it, amounting to $44,759.71.

Plaintiff rests.

150 ALLEN S. APGAR, called as a witness for the defendants, testified:

I am cashier of the Merchants' Exchange National Bank in the city of New York, and have been for eighteen years, and am familiar with the course of banking business during that period of time, and am acquainted with what are known as cashier's checks or drafts. At times I am in the habit of drawing checks or drafts on our correspondents; not as a general thing, as our cashier's checks are generally drawn on the bank I am connected with. We are not in the habit of drawing on out-of-town banks to the extent that they are of drawing on New York banks. Where a bank is in good standing, these cashier checks are taken as cash.

Q. Would you hesitate to take a cashier's draft or check on a bank of which he was cashier for individual transactions of his own?

A. No, sir.

On motion of plaintiff's counsel, the answer is stricken out. Defendants' counsel excepted.

Q. Is there any custom or usage with regard to receiving cashier's checks as cash on transactions with the cashier individually?

Objected to by plaintiff's counsel as incompetent. The objection was sustained, and defendants' counsel excepted.

151 A. There is a custom or usage in regard to the acceptance of cashiers' checks drawn upon banks of which they are cashiers, in the individual transactions of such cashier.

Q. What is it?

Objected to by plaintiff's counsel as immaterial. Question excluded. Exception by defendants.

Q. For how long a period of time has that custom and usage existed?

Objected to by plaintiff's counsel as immaterial. Objection sustained. Defendants except.

Plaintiff's counsel admitted that there was such a custom or usage in May, 1880, and prior to and subsequent to that time.

Q. By that custom and usage is there any difference between the acceptance of a cashier's draft or check on a transaction in which he is individually interested and a transaction in which he acts solely on account of his bank?

Objected to by plaintiff's counsel as immaterial. Question excluded. Exception by defendant-.

Q. Was there during the years 1880 and 1881 any difference between the custom of bankers and brokers in accepting cashier's checks, between the acceptance of checks drawn by a cashier for his own account individually and checks drawn by a cashier for the account of other persons?

Objected to by plaintiff's counsel as immaterial. Question excluded. Exception by defendants.

A. I have known the firm of Kissam, Whitney & Co. since they began business, in 1880. I knew their predecessors.

152 Q. What is the reputation and standing of the defendants' firm?

Objected to by plaintiff's counsel as irrelevant. Objection sustained. Defendants except.

Defendants' counsel states that, owing to the withdrawal of the check of $706.08 (Ex. 9), the interest should be $44,759.71 instead of $45,000, as before stated.

HORACE J. MOORE, sworn and examined as a witness for the defendants, testified as follows:

Defendants' counsel stated that they propose to put to this witness the same series of questions that were put to Mr. Apgar, Mr. Moore being a banker and broker, in order that the qualification of the witness may be different.

I am a banker and broker in Wall street and a member of the firm of A. M. Kidder & Co., and have been a member of that firm for ten years, and am familiar with the customs and usages of business of bankers and brokers in the city of New York. I am familiar with the custom and usage of bankers in respect of the drawing and use of cashiers' checks—that is, checks drawn by the cashier of a bank as cashier upon the correspondent of the bank. It is the custom for bankers and brokers to accept and treat as cash checks drawn by the cashier of out-of-town banks upon the New York correspondents of those banks where the bank is in good credit.

153 The same questions as were put to the witness Apgar were then put to this witness in regard to the custom of treating cashiers' checks as cash and of receiving the same for the individual account of the cashier drawing such checks.

Same objection, ruling, and exception by defendants' counsel.

ROSWELL G. ROLSTON, sworn and examined as a witness for the defendant-, testified as follows:

I am the president of the Farmers' Loan and Trust Company of the City of New York and have been since 1865. I am familiar with the customs and usages of the business of bankers and brokers in the city of New York and with the custom and usage of banks and trust companies in respect of the drawing and use of cashiers' checks. It is the custom for bankers and trust companies to accept and treat as cash checks drawn by the cashier of out-of-town banks upon the New York correspondents of those banks.

The same questions as were put to the witness Apgar were then put to this witness in regard to the custom of treating cashiers' checks as cash and of receiving the same for the individual account of the cashier drawing such checks.

Same objection, ruling, and exception by defendants' counsel.

SAMUEL H. KISSAM, one of the defendants, called as a witness for defendants, testified:

154 The firm of Kissam, Whitney & Co. was formed in May, 1880. I was engaged in business as banker and broker in 1863 as a member of the firm of Kissam & Co., which firm continued until 1876, and from 1876 to 1880 I was a broker. Before that time I had been for about fifteen or sixteen years in the Bank of Commerce, in this city, in almost every capacity from check clerk to paying teller. The checks in suit were received by our firm and applied to Warner's account in good faith and in the belief that those checks had been properly obtained from the bank of which he was cashier. My suspicion was never aroused with regard to the validity of those checks or in regard to their having been honestly obtained. During all my experience cashiers' checks drawn by the cashier of a bank on the correspondent of that bank in New York have been received and treated as cash.

Q. During your experience in the bankers and brokers' business has there been a custom and usage in regard to accepting and receiving cashiers' checks such as those in controversy here for the individual transactions of such cashier?

Objected to by plaintiff's counsel as immaterial, irrelevant, and incompetent. Excluded. Exception by defendants.

I am a member of the New York Stock Exchange, and most of my time is spent in the exchange. I have seen Mr. Warner several times in the office. I never had a conversation 155 with him with regard to who was interested with him in this account or about the business transactions between him and my firm. Before this account was transferred to us Mr. Whitney told me that other persons were interested with Warner in his account. I had no connection with the firm of Chase & Atkins.

Cross-examination:

We took these checks and passed them to Warner's credit and expended the amount for his benefit in the stock transactions without any suspicion that they were not Warner's personal money. A large proportion of the transactions were other than stock dealings. We did quite a large banking business for Warner personally. I never had any idea but that this money received on those checks was Warner's own personal property.

Q. Look at the check now shown you, drawn by Russell Sage, dated April 12th, 1883, to the order of Albert S. Warner, executor of the estate of R. S. Burrows, for $6,518.50, endorsed "Pay to the order of Kissam, Whitney & Co.; Albert S. Warner, executor of the estate of R. S. Burrows; Bank of New York, N. B. A., credit Kissam, Whitney & Co.," and endorsed "Kissam, Whitney & Co.," and state whether you did not take that check from Albert S. Warner and credit the account which has been shown in evidence with that money.

Objected to by defendants' counsel on the ground that the same

was immaterial and irrelevant and not within the period
156 covered by the checks. Objection overruled. Exception by defendants.

A. I have never seen the check and know nothing about it. My partner would give evidence on that. I do not attend to anything inside the office. I never knew it went to his credit. It did not excite any suspicion in my mind that the checks which Warner handed over to us did not bear any number. I never noticed nor saw them. Business people and banks who have large accounts often have their names on their checks to indicate that it is one of their checks. I do not recall any bank which issued official checks on which was not imprinted in some way on the check the name of the bank that was going to draw it. The Bank of Commerce, when I was there, had its name printed on its checks, but they issued a great many checks that had no name on. There were many check books used with no other name on than that of the Bank of Commerce. I have probably not seen any of the checks in suit. They go through the cashier's department. They may have all gone through and I never have seen them.

HENRY N. WHITNEY, one of the defendants, called as a witness, testified:

I have been a member of the firm of Kissam, Whitney & Co. from its organization. Prior to that time I was a partner for about sixteen months with Chase & Atkins, and previous to that I was their cashier for three and a half years. I became a partner by
their giving me an interest in the profits instead of a salary,
157 but I continued to discharge the same duty I did before. I had been cashier of that firm and of its predecessor about eight years and eight months. When the account was transferred by Chase & Atkins to the defendants Mr. Chase informed me that other persons were interested with Warner in that account, but that Warner was to have the management of it. Soon after the account was transferred I had a conversation with Mr. Warner, and he told me that other parties were interested with him in the account, but that he was to have charge of it. The defendants took and continued the account with Warner in the belief of the truth of the statements so made to defendants by Mr. Chase and by Warner. The checks in suit were received by defendants in good faith. I have charge of the correspondence, seeing customers, giving out orders, and have general charge of the office. Mr. Washburn acted as cashier and Mr. Kissam as member of the stock exchange. Nothing occurred during the continuance of the account with Warner to lead me to suspect that there was anything wrong with regard to the account. These checks were received in the belief that they were properly obtained from the bank by Warner and the parties interested with him in the account. The defendants acted on that belief and nothing occurred to shake that belief. No question was ever made by the Third National Bank with regard to the payment of any of these checks in suit, and I never heard any question raised

158 in any quarter with regard to Warner's authority to use these checks in the manner in which he was using them. Our attention was not called to this account or to these checks more particularly than to any other account or any other checks. These checks were never made the subject of comment in our office between my partners and myself or between me and any one else. The acknowledgements of amounts remitted by our correspondents and the advices of credits were written by our correspondence clerk and generally signed by me, and in case of my absence by some other member of the firm. There were seven or eight clerks or book-keepers in our establishment generally during the period of this account. The extent of the business of our firm from May, 1880, to August, 1881, was very large. I do not think I could tell the amount within $25,000,000. The millions represented the amount of our purchases and sales of stock. We had deposits in the millions. Our business was not confined to buying and selling stocks. We did a regular banking business. This account with Warner was a regular banking account as well as a stock account. We had and kept but one account with him—a very small proportion to our general business. We did not regard it as a large account. We did not regard it as a speculative account—that is, a purely speculative account. What we call a speculative account is an account which has nothing but stock transactions in it; buying or selling on margin is a speculation. An account which paid between $6,000 and $7,000 commission was a very small ac-
159 count. It might have been three or four per cent. of our business.

Cross-examination:

The attention of the witness was called to the check of Russell Sage, which was exhibited to the witness, Kissam, dated April 12th, 1883, for $6,518.50, drawn by Sage to the order of Warner, executor, and the witness states that he does not remember anything about any such checks. I cannot say whether it was or not entered in Warner's account. I am sure, from the endorsement on it, that it went to our credit through our bank.

The check was offered in evidence. Objected to by defendants' counsel. Objection overruled. Defendants' counsel excepted.
Check marked Plaintiff's Exhibit 60.

I am the person who actually received the various remittances from Warner. When I received them they were passed over to Mr. Washburn, and then they would be entered in the books, and the letters which I had opened containing the checks were preserved or filed away.

Plaintiff's counsel states that from a statement made by the plaintiff it appeared that the total amount received by defendants from Warner up to Sept. 27, 1881, and credited to Warner's account, was $210,409.48, of which $103,706.08 came of the checks in suit and $107,703.48 came from other sources.

It is admitted that the check of Russell Sage, dated April
160 12, 1883, for $6,518.50, to the order of Albert S. Warner, executor, and referred to in the testimony of the defendant Kissam was credited by the defendants to the account of Albert S. Warner as a remittance on that day.

(The witness continues:) I do not know anything about that check. I do not remember anything about it. It is our custom to accept checks of cashiers of banks or checks of officials of banks drawn to the credit of our firm and to credit them to the individual credit of the person by whom they were drawn, in stock transactions.

Q. Is it also your custom to take checks which are drawn to the order of an executor and which are endorsed by the executor as such and credit those to the executor's private account?

Objected to by defendants' counsel. Objection overruled, and defendants' counsel excepted.

A. We will take a check and put it in a man's private account, if we had no reason to suppose that it was wrong. In case of this check, it seems to have gone into the account.

On redirect examination the witness states:

The Sage check is entered in the account with Warner, April 12, 1883, as a remittance, and his account was balanced the same day, and including that check there was to his credit $6,620.74. No part of that check went to the benefit of Kissam, Whitney & Co., in any way, shape, or manner. The check for $6,000, Ex. L, was
161 drawn against the $6,620.74. There were no transactions of any kind or description, in stocks or anything else, with Warner between April 12th and July 1st, and on the 1st of July, after charging Warner with that check for $6,000, and with a check of $250, also mentioned in the account, there was to his credit $381.21.

In answer to a question by the court the witness stated that if Warner had deposited a check payable to himself as executor and used it as margin for his stock account it would have excited suspicion as to the propriety and conduct of the executor.

BENJAMIN FRANCIS WEST, a witness for defendants, testified as follows:

I was in the employ of the First National Bank of Albion as book-keeper from the fall of 1880 until the bank closed. While I was in the bank dividends were declared regularly with one omission, about 1883. Some of the notes of Warner and of Stewart & Warner, referred to by Mr. Anderson in his testimony, went back to 1875 or 1876. Warner was frequently absent from the bank. He would be absent for a fortnight three or four times a year. He would be absent for a few days at a time; probably a week at a time. He would be to and fro nearly all the time. I should judge that he spent one-half his time at Albion. I had known Warner since 1878. He lived there with his family. His reputation was first-class. He lived in good style and was reputed to be wealthy,

and I regarded him as such. I think it was generally known
162 in Albion that Warner was operating in stocks. Everybody seemed to know about it. This was the case from the time I first knew him, in 1878. I cannot say how general this impression at Albion was that he was operating in stocks during this period of time. People used to speak of it frequently, and it used to be known about, and I should regard it as quite general and frequently spoken of. I never heard it talked over in the bank, but I did hear it talked over by outsiders. Mr. Coan always opened the mail during Warner's absence, after the death of Mr. Stewart, as a rule. The Third National Bank were in the habit of advising the Albion Bank of the amount paid to its credit by deposits or otherwise. These advices were on little printed slips. While I was book-keeper of the bank I saw a number of them. They would come to the bank through the regular mail, which was opened by Stewart, and also in the mail which was opened by Coan, and in the mail which I opened. The items in these notices were not compared with the cash book but with the letter book. The bank kept copies of the letters which it wrote to the Third National Bank, enclosing items for collection, and when these advices would be received they would be checked off by the boy in the bank and compared with the letters enclosing the items for collection. He didn't do anything more than that. He had nothing to do with checking off the amounts deposited to the credit of the Albion Bank. I found many of the statements from the Third National Bank, after Warner went away, which had not been opened.
163 I don't remember how many there were, but they extended back into 1879 or 1880. I was at the bank at the time its charter was extended, in 1883. A special examination was made by the examiner sent by the Comptroller of the Currency. It was in February, 1883, or about that time. He made a thorough examination. He had nobody to assist him. I do not know whether Mr. Coan assisted him, but probably he did. He may have examined the weekly trial-balance sheet of the books of the bank, which was made up during all the period I have spoken of. Coan made these up. At the time of the examination for the purpose of extending the charter the examiner examined the funds of the bank and the notes and the assets of the bank generally to see if they tallied. He got the information from the items themselves, and also from the currency and coin. He counted all that over. While I was book-keeper in the bank, in the fall of 1880 and subsequently, I wrote letters for Mr. Warner in regard to his stock operations, to the defendants, and to other persons. Quarterly reports were made by the Albion Bank, and as a rule were made by Warner. Copies of the quarterly statements were kept and were in the bank when Warner left. I think they were verified, as a rule, by one of the directors

On cross-examination the witness stated as follows:

When I first went into the bank the idea was that I was to attend to the business of Burrows' estate, but Warner finally attended

164 to the estate business and I occupied my time in the bank. I began to give my entire time to the bank along in 1880 or 1881. I was connected with Warner from the end of 1878 until 1880, and used to do his work, and then if they wanted any help in the bank I used to help in the bank. I wrote outside letters for Warner as to private matters. I do not know that deposits were made in the Third National Bank which were not credited on the books of the Albion Bank.

Q. If you saw those returns and participated to the same extent in checking them off, how is it that that matter escaped your attention?

A. I never supposed there was such a thing, and I never found it out. I was not aware that Warner was drawing checks on account of the First National Bank on the Third National Bank which did not appear on the books of the First National Bank. It was a surprise to me when it came out. He was reputed to be worth, I suppose, anywhere from $20,000 to $50,000. Everybody seemed to suppose that he was well off. His credit was perfectly good there. The notes to which I refer, made by Warner and Stewart & Warner, had been running for some time. The interest would be added to them and new notes put in their places. The new notes would be signed by Warner account of Stewart & Warner, and they were carried in that way.

THOMAS B. ATKINS, sworn and examined as a witness for the defendants, testified as follows:

165 I was a member of the firm of Chase & Atkins. I had been in business as principal for ten years and as clerk for seven years more, and during all that time was engaged in the business of bankers and brokers. I am familiar with the course of business and with their customs and usages during all that time. Warner's account was opened with our firm in the latter part of 1879 and continued until the transfer to the defendants, in 1880. During that time we received some checks like those in suit here, in the ordinary course of business. The first information I had in regard to other persons being interested with Warner in the account with Chase & Atkins was that Mr. Chase told me that Mr. Warner had said to him that others were interested in the account, and afterwards Warner himself told me the same thing—that others were interested with him in the account, and that he, Warner, was to have the management of the account, and I believed that statement; and our firm made that statement in good faith to Kissam, Whitney & Co. when the account was transferred.

Cross-examination by plaintiff's counsel:

Witness is shown three checks purporting to have been drawn by Warner, cashier, to the order of Chase & Atkins, one dated March 1, 1880, for $7,000; another dated April 5th, for $5,000; another dated April 15th, for $15,000, and another dated May 7th, for $14,000, and the witness states:

Our name is on the backs of the checks you now show me,
166 but it was not written by me. I cannot say that they were received. I suppose they were.

GEORGE H. CHASE, sworn as a witness for defendants, testified as follows:

I was one of the firm of Chase & Atkins. I have been engaged in business as banker and broker for ten years. I knew Warner. When the matter of opening that account was spoken of between Warner and me, Warner said that other persons were interested with him in the account, and that he was to manage the account. I believed that statement, and I made those statements to the firm of Kissam, Whitney & Co. at the time the business was about being transferred to them. I told them what Warner had told me. The account was opened November 22nd, 1879, by a remittance of $5,000.

Defendants rest.

R. TITUS COAN, recalled for plaintiff, testified as follows:

Warner was not considered a man of great means or wealth after 1880. I should have estimated him to have been worth from $15,000 to $20,000. His credit was good at Albion, and his reputation was good.

Testimony closed.

Defendants' counsel requested the court to direct the jury to find a verdict for the defendants.

The court declined, and defendants' counsel excepted.

Defendants' counsel requested the court to direct a verdict
167 for the defendants on the ground that there is no evidence of any demand made by the plaintiff upon the defendants.

The court declined, and defendants' counsel excepted.

Defendants' counsel also requested the court to instruct the jury that the defendants are entitled to be credited with the amounts of money which were deposited by them in the Third National Bank to the credit of the First National Bank of Albion.

The court declined, and defendants' counsel excepted.

Defendants' counsel also requested the court to instruct the jury that the defendants were entitled to be credited with such of the amounts so deposited by them in the Third National Bank to the credit of the First National Bank of Albion as were entered in the books of the latter bank and thereon debited to the former bank.

The court declined, and defendants' counsel excepted.

Defendants' counsel requested the court to instruct the jury, in case they find a verdict for the plaintiff, it cannot exceed the difference between the accounts between the two banks as contained on their respective books, as stated by Mr. Anderson, and interest.

The court declined, and defendants' counsel excepted.

Defendants' counsel also requested the court to instruct the jury that in case they find a verdict against the defendants they cannot

find a verdict for the $10,000 check, Ex. No. 15, which was
168 used on paying the loans made by the Bank of New York to Warner.

The court declined so to charge, and defendants' counsel excepted.

Defendants' counsel also requested the court to instruct the jury that if they should find a verdict for the plaintiff it cannot be for any sum in excess of the difference between the checks in suit and the sums paid by the defendants into the Third National Bank and not entered in the books of the Albion Bank.

The court declined so to charge, and defendants' counsel excepted.

Defendants' counsel also requested the court to instruct the jury that, no demand having been made, no interest could be allowed.

The court declined so to charge, and defendants' counsel excepted.

Defendants' counsel also requested the court to instruct the jury that if any allowance of interest should be made it should not be made for any period beyond the commencement of this action, which was the 8th day of January, 1885.

The court declined so to charge, and defendants' counsel excepted.

Defendants' counsel also requested the court to instruct the jury that the plaintiff, if entitled to a verdict, could not recover any of the checks in suit which had been paid out of moneys depos-
169 ited in the Third National Bank to the credit of the First National Bank of Albion by Warner or by his direction.

The court declined so to charge, and defendants' counsel excepted.

Defendants' counsel requested the court to charge the jury further as follows:

First. The plaintiff cannot recover unless the jury find that he has proved that the defendants took the checks in suit with actual knowledge of Warner's fraud or in bad faith.

Second. That mere negligence on the part of the defendants in taking said checks would not make them liable.

Third. That even though the jury should find that the defendants did not exercise the care and caution which prudent men would naturally exercise in taking the checks in suit, that is not sufficient to render them liable.

Fourth. That even gross negligence on the part of the defendants is not sufficient make them liable.

Fifth. That the authority of a cashier may be by parol and inferred from the general manner in which for a period sufficiently long to establish a settled course of business he has been allowed without interference to conduct the affairs of the bank.

170 Sixth. That the authority of a cashier may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors.

Seventh. That when a cashier in numerous business transactions has been permitted, without objection and in his official capacity, to pursue a particular course of conduct it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations.

Eighth. That the directors of a bank cannot in justice to those who deal with the bank shut their eyes to what is going on around them, and that it is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers.

Ninth. That which such directors ought by proper diligence to have known as to the general course of business in the bank they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.

171 The court, among other propositions, charged the jury as follows:

Preliminarily it is my duty to instruct you that you may find upon the evidence here that Warner was permitted by Mr. Stewart or by the directors of the bank to draw checks upon the Third National Bank, in the name of the bank, for his own use, as he desired. You may find that, or you may find that Mr. Stewart and perhaps others of the directors were in collusion with Warner. If those who represented the stockholders of the bank as its managers permitted him to loan its moneys to himself and to use them for his own speculative purposes as he desired, not intending to commit any fraud upon the stockholders, not collusively, not as co-conspirators, but if they did this trusting in his integrity or believing that the bank would not be injured by it, or as a matter of loose management, if they did it honestly, why that is the end of this case; but if they did it collusively, then their consent cannot shelter these defendants, because they had no power by virtue of their position to consent to a fraud upon the stockholders of the institution.

To this last sentence of the charge defendants' counsel excepted.

The court further charged as follows:

The more serious question for you to consider is, whether the defendants believed when they received these checks that
172 Warner was using the money of the bank for his speculative purposes without authority.

To this portion of the charge defendants' counsel excepted.

A cashier has no authority to loan the money of the bank to himself. He has no authority to endorse the name of the bank upon his paper for his own accommodation. He has no right to draw its drafts for his own private purposes; and these defendants, as bankers, were bound to know that these were limitations upon the ordinary authority of a cashier. The question is, Did they suppose that some special or extraordinary authority had been conferred upon him by the consent of his co-managers of the bank?

To this last sentence of the charge defendants' counsel excepted.

They are not liable in this case simply because they failed to exercise due caution. They are not liable upon any theory of negligence. They are liable only for bad faith. But they had no right to shut their eyes and stop their ears, so that they could not see or

hear ; and if this was done wilfully they must take the consequences, because that would not have been good faith.

The court further charged as follows:

"I instruct you that the defendants are chargeable with notice that Warner's appropriation of the bank's money by drafts drawn as cashier to his own use was irregular and unauthorized, unless those other than himself, who lawfully represented the bank as its officers or directors, had given him special authority to do so."

173 To this portion of the charge defendants' counsel excepted.

If the defendants really believed that Warner had obtained such authority—not by collusion with unfaithful officers or directors, but by an honest arrangement with them to allow him to loan the moneys of the bank to himself—if the defendants honestly believed that, then they are not liable.

To this portion of the charge defendants' counsel excepted.

These defendants were bound to know that the directors of the bank could not consent to a fraudulent diversion of the funds of the bank ; and so, if upon any theory of the facts in this case you can come to the conclusion that the defendants supposed that the other directors were in collusion with Warner to sanction a clandestine use of the funds of the bank for his or for their speculations, the defendants cannot shelter themselves behind that belief.

To this portion of the charge defendants' counsel excepted.

The case against them starts with the presumption that they knew he had no right, under the ordinary authority of a cashier, or of a president, or of a director, to transfer the funds of the bank by drafts drawn by him in his official capacity to his own private use.

To this defendants' counsel excepted.

174 And yet they may have thought that outside of this, by some special arrangement, by the special confidence reposed in him by those associated with him, that he was permitted to indulge in this extraordinary course of business for a bank cashier.

To this defendants' counsel excepted.

The question of knowledge on the part of the defendants, of the belief they entertained when they took these checks, is a question solely and exclusively for you. It is a question of fact to be determined upon the evidence, and it must necessarily be determined by circumstantial evidence and the testimony of these defendants themselves.

It is not necessary to find that these defendants were co-conspirators with Warner in a scheme to ruin this bank. It is not necessary for you to find that they contemplated that any loss would ultimately fall upon the bank in consequence of Warner's irregular transactions. It is enough if they knew he was speculating with the money of the bank without the consent of those who were

authorized to give its consent. If they knew that, they must take the consequences.

I have ruled during the course of the trial that the fact that the defendants paid in under Warner's direction to the Third National Bank the large sums of money which were paid in is of no materiality as affecting the legal rights of the parties.

To this portion of the charge defendants' counsel excepted.

175 The defendants are liable if when they received this money (if it was the money of the bank appropriated by Warner without the consent of the directors) the defendants believed that he had taken it, without the consent of the directors, to use for his speculations.

To this portion of the charge defendants' counsel excepted.

That is the only inquiry.

To this portion of the charge defendants' counsel excepted.

But the circumstance that they did pay these large sums of money by his direction into the bank is entitled to consideration as bearing upon the question of their belief and good faith, and in that view it is an important circumstance in their favor.

Defendants' counsel excepted to the refusal of the court to charge in accordance with the request numbered first and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel excepted to the refusal of the court to charge in accordance with the request numbered second and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel excepted to the refusal of the court to charge in accordance with the request numbered third and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel excepted to the refusal of the court to
176 charge in accordance with the request numbered fourth and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel excepted to the refusal of the court to charge in accordance with the request numbered fifth and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel excepted to the refusal of the court to charge in accordance with the request numbered sixth, and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel excepted to the refusal of the court to charge in accordance with the request numbered seventh and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel excepted to the refusal of the court to charge in accordance with the request numbered eighth and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel excepted to the refusal of the court to charge in accordance with the request numbered ninth and to the charge as given by the court in respect to the subject-matter of said request.

Defendants' counsel also excepted to each and every portion of the

charge in which the court instructed the jury that there must be an affirmative belief on the part of the defendants in regard to Warner's authority to issue and use the checks in question as distinguished from a negligent failure to consider the circumstances under
177 which such checks were issued, received, and used.

Defendants' counsel thereupon asked the court to charge the jury in accordance with the principles laid down in Simonds *vs.* Goodman, 20 How., 343.

The court stated: "I intended to apply the rule in that case which is the test of good faith in the purchase of commercial paper, and I think I have done so. I am not at all sure that I shall be sustained in applying it, but I shall give you the benefit of it."

To this defendants' counsel excepted.

The jury having retired, the court received from the jury the following written communication:

"The jury desire information on the following point:

"Has the cashier of a bank the legal right to draw a check as cashier of the bank and use it for personal purposes, provided he deposit funds to meet it or is properly authorized by the officers of the bank to draw said check?"

To which the court replied in writing:

"Cashier — no right to draw check as cashier and use it for personal purposes, although he intends to deposit funds to meet it. He has the right to do so with the consent of the directors or managing officers of the bank."

Defendants' counsel excepted to the answer given by the court to the question put by the jury.

Subsequently the court received from the jury the following written communication:

"In the absence of proof as to whether a cashier has or has
178 not the right by proper authority to give a cashier's check for his personal account, does the burden of proof rest with the defendants, or do they get the benefit of the doubt?"

To which the court replied in writing:

"Defendants are chargeable with notice that Warner's appropriation of the bank's money by a draft as cashier to his own use was irregular and unauthorized, unless those other than himself, who lawfully represented the bank as its officers or directors, had given him special authority to do so."

To this defendants' counsel excepted.

"If the defendants really believe that Warner had obtained such authority, not by collusion with unfaithful officers or directors, but by an honest arrangement to allow him to loan the moneys to himself, they are not liable."

To this defendants' counsel excepted.

"The important question is whether defendants believe that the

responsible managers of the bank, without fraudulent complicity on their part, had consented to Warner's use of the money of the bank as he did use it."

To this defendants' counsel excepted.

The jury, having returned to the court, stated that they found for the plaintiff for the full amount, with interest.

The court thereupon stated: "I did not mean to charge you that if you found for the plaintiff he was entitled as matter of right to interest; but I should have instructed you, and I now in-
179 struct you, so that you may reconsider, if you prefer, that you are at liberty to award interest by way of damages, but you are not required to do so."

The foreman stated that it was a misunderstanding on the part of the jury; that they simply intended to find for the plaintiff, and asked the court for instructions whether in case interest was awarded it should cover the times from the date of the checks, the date of the receipt of the money, or from the date of the commencement of the suit; to which the court answered that interest, if awarded, should run from the date of the receipt of the money by the defendants; that it was in the discretion of the jury to award interest by way of damages for the money from the date it was received.

The jury thereupon stated that they found a verdict for the plaintiff, with interest from the time of the receipt of the money.

It was thereupon stated by counsel that the principal of the checks was $103,000.00 and the interest was $44,759.71. The jury thereupon rendered a verdict for the plaintiff for $147,759.71.

Defendants then requested that their exceptions might be signed and sealed, and inasmuch as the matters herein set forth do not appear in the record the same have been reduced to writing, and being found to be correct this bill of exceptions is allowed by the court and directed to be filed as of the 25th day of April, 1888, before the jury left the bar.

180 Afterwards the court heard and denied a motion for a new trial.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, S. D. of N. Y. Henry J. Anderson, as receiver, &c., against Samuel H. Kissam and others. Bill of exceptions. Burrill, Zabriskie & Burrill, attorneys for defendants, 21 Broad street, New York, Mills building. Due and timely service of a copy of the within bill of exceptions is admitted. Dated New York, September 12, 1888. U. S. circuit court. Filed Sept. 15, 1888. John A. Shields, clerk.

181 United States Circuit Court, Southern District of New York.

ANDERSON, Receiver,
vs.
KISSAM *et al.*

WALLACE, *J.*:

This action is in substance one of trover to recover moneys of the First National Bank of Albion, alleged to have been wrongfully appropriated by the defendants during the years 1880 and 1881. The case was tried with a jury, and the jury found a verdict for the plaintiff for $103,000 principal, with $44,759 interest. The case is now here upon a motion by the defendants for a new trial.

It appeared by the evidence that in 1880 one Warner was the cashier of the Albion Bank, and for some time had been intrusted with the almost exclusive management of its affairs. In November, 1881, he became its president. In August, 1884, the bank failed, Warner absconded, and the plaintiff, who was appointed its receiver, took possession of the assets. An examination of its affairs showed that Warner had misappropriated moneys and securities of the bank to the amount of over $300,000, and was otherwise indebted to the bank in a considerable sum. It was further shown that Warner had been carrying on stock speculations through the agency of the defendants, who were stock brokers and bankers of New York city; that he opened a customer's account with them
182 May 11, 1880, and continued to buy and sell stocks and securities upon margins through them, and to deposit with and draw upon them as bankers during that year and the next, and that from time to time the defendants received large sums of money from him by checks of the Albion Bank, payable to their order, drawn by Warner as cashier upon the Third National Bank of New York City. The defendants collected these checks and placed the proceeds to Warner's credit in his account with them. It was also proved that for many years the Albion Bank had kept a banking account with the Third National Bank of New York and had been accustomed to draw upon it at sight and send it collections and remittances; that after Warner became the cashier of the Albion Bank he took personal charge of the correspondence between that bank and the New York bank and intercepted the letters of advice and monthly statements sent by the New York bank to the Albion Bank, and adopted other methods to conceal from the other persons associated with him in conducting the Albion Bank the true state of the account between the two banks; that from time to time he deposited with the New York bank in the name of the Albion Bank funds in his possession, and from time to time drew checks and drafts in the name of the Albion Bank, as cashier, upon the New York bank for his own transactions and speculations, and that the checks and drafts thus drawn by Warner for his own use were not credited to the New York bank on the books of the Albion Bank, nor were the deposits made in the name of the Albion Bank by Warner personally charged to the New York bank on the books

of the Albion Bank, although they were credited to the Albion
183 Bank by the New York bank, and neither the checks or drafts nor the credit items appeared in any way upon the books of the Albion Bank. The evidence was sufficient to justify the jury in finding that Warner used the account of the Albion Bank with the New York bank as the means of appropriating, without the knowledge of the directors or other officers of the Albion Bank, and clandestinely, the funds and credit of that bank for his own benefit. It appeared by the books of the two banks that the checks and drafts upon the New York bank and charged to the Albion Bank, but not credited by the Albion Bank to the New York bank, during the period of Warner's defalcations amounted to $267,000, and the deposits credited by the New York bank to the Albion Bank, but not charged by the Albion Bank to the New York bank, during the same period amounted to $281,000.

The checks received by the defendants between May 11, 1880, and August 26, 1881, and including those dates, aggregated the amount of $103,000. During the same period they received from Warner from other sources $107,703. The defendants bought and sold stocks for Warner on a margin of 10 per cent., and many of the checks in question were received by them pursuant to their request to remit for margins. The first and last checks were for $10,000 each. One was for $15,000. In January, 1881, they received checks for margins aggregating the sum of $50,000. Testimony was given for the plaintiff tending to show that Warner was rated where he resided as worth from $15,000 to $20,000, and testimony was given for the defendants tending to show that they supposed that other persons were interested with Warner in his stock
184 transactions and did not suspect that he was using the funds of the bank illegitimately. It also appeared that from time to time Warner drew on the defendants, and that during the period covered by the checks in controversy they paid on his drafts into the Third National Bank, to the credit of the Albion Bank, at various times, sums aggregating $89,202, and that this amount was credited to the Albion Bank on the books of the New York bank, and $25,850 thereof was charged on the books of the Albion Bank to the New York bank, but the rest did not appear in the books of the Albion Bank.

Upon the trial the court excluded the testimony offered by the defendants to show that it was customary with bankers and brokers of New York city to receive cashiers' checks and drafts drawn in favor of their own banks upon New York banks as cash upon transactions with the cashier individually.

At the close of the testimony the defendants requested the court to instruct the jury to find a verdict for the defendants. Defendants also requested the court to instruct the jury that the defendants were not liable for any sum in excess of the difference between the sums received by them from Warner upon the checks of the Albion Bank and the sums paid by them on Warner's drafts to the New York bank to the credit of the Albion Bank. The court refused such instructions.

The court instructed the jury in substance that it was incumbent upon the plaintiff to establish that the moneys represented by the checks received by the defendants were moneys of the bank
185 which had been misappropriated by Warner, and that when the defendants received the checks they took them with guilty knowledge that Warner in using them was misappropriating the funds of the bank, and that unless they found both these propositions established by the evidence their verdict should be for the defendants. They were further instructed that they might find upon the evidence that Warner was permitted by the directors of the bank to draw such checks for his own use or to use the money of the bank for his own purposes, or they might find that the directors of the bank were in collusion with Warner and cognizant of his transactions; that if they found that those who represented the stockholders of the bank as its directors or mangers permitted Warner to draw such checks or use the moneys of the bank for his own purposes, not as co-conspirators or collusively, but trusting in his integrity or believing that the bank would not be injured, or through lo-se management on their part, the plaintiff could not recover; but if they did this collusively their consent could not shelter the defendants, because they had no power by virtue of their position to consent to a fraud upon the stockholders. The jury were further instructed that upon the issue whether the defendants received the checks with guilty knowledge the queston was not whether they were negligent in receiving them or in allowing Warner to deal with them as they did, but the question was whether they were guilty of bad faith; that defendants were bound to know that a cashier has no authority as such to loan the money of the bank or use its checks for his personal use; that the jury were
186 to infer that the defendants knew this when they received the checks, and therefore the question was whether the defendants believed that by some special arrangement or confidence Warner was permitted by those who were associated with him in the management of the bank to use its checks and moneys as he did, and if the jury found that the defendants so believed the defendants were not guilty of *mala fides*.

The defendants insist upon this motion that the court erred in excluding the testimony of custom, in refusing to instruct the jury as requested, in the instructions given to the jury, and urge other grounds for a new trial.

In some aspects this is a hard case for the defendants. If the verdict stands, they are made responsible to pay over a very large sum of money which came to their hands to be invested and handled for another person in consideration of a small commission to be received by them and which they have paid back to the person from whom they received it, and there is no reason to suppose that they had any active or defined purpose when they received the money or at any time of assisting the person from whom they received it to defraud others or to injure others in any way. It is altogether likely that they could have shown, if they had been permitted to do so, by the testimony of any number of respect-

able bankers and brokers that it is every-day practice in Wall street for those in their line of business to buy and sell stocks for bank presidents and cashiers who are speculating there, and to accept drafts and negotiable paper of the corporations of these officers, made by them officially, in payment of the margins or purchase-money. It is not improbable that they might
187 have produced plenty of credible and reputable witnesses to show that such transactions are so frequent and common in Wall street that they do not attract special notice, and do not usually excite a passing suspicion that they are irregular or improper. In this view of the case, it may be that the defendants are to be regarded not as intentional wrong-doers but as the victims of an unfortunate environment. No usage, however common and well recognized, can be invoked to justify a banker or any one else in taking money or negotiable paper in payment of an agent's debt known to belong to his principal, or known to belong to a trust estate, to satisfy the trustee's personal debt, or to shield the banker from accountability who wilfully closes his eyes and stops his ears to facts and circumstances which import notice that the agent or trustee is misappropriating the money or property intrusted to him. Therefore, if there is any significance in the fact that a bank president or cashier offers negotiable paper of his corporation,
188 made by him in his official character, in payment of his personal debt or to raise money for his personal use, it matters not that bankers generally do not appreciate it. If they regard the transaction as equivalent to one in which the individual comes with money in hand they ignore its real character, because in that case he comes with what purports to be his own, having the possession, which implies title and ownership and the right to use it as he sees fit. When he comes with the money obligations of a corporation, which is the contract of a corporation only because he has made it, and which is not its contract if he has made it without authority, the transaction is a very different one. Every person who takes such an obligation must ascertain at his peril that the agent who has made it was authorized to do so, and the moment it appears that the contract has been made for the agent's own use and benefit, that moment his authority is impugned and impeached. No principle of the law of agency is better settled than that no person can act as the agent for another in making a contract for himself; therefore it is that a bank president or cashier has no implied authority to bind his corporation to negotiable paper made for his own use; and if it appears upon the face of the paper that it is payable to the individual who has made it in an official capacity the obligation is nugatory and no purchaser can enforce it. Upon this principle it was held in Claflin *vs.* The Farmers' & Citizens' Bank (25 N. Y., 293) that a general authority to the president of a bank to certify checks drawn upon it does not extend to checks drawn by himself, and if the face of the check shows the president's
189 attempt to use his official character for his private benefit, every one to whom it comes is put upon inquiry, and if the certificate is false no one can recover against the bank as a *bona fide*

holder. So, too, it was held in West St. Louis Savings Bank *vs.* Shawnee County Bank (95 U. S., 557), where a bank cashier made his individual note payable to the order of his bank and endorsed it officially, that a purchaser of the note was charged with notice that the endorsement was not within the implied authority of the cashier and must prove actual authority in order to recover of the bank as endorser. It can make no difference whether the agent or officer appears to be the party to whom the paper is payable upon the face of the instrument, or whether it appears by extrinsic facts that he is the real party for whose benefit it was made; consequently, whenever he offers the instrument under circumstances which show that he has made it officially for his private use the party dealing with him must take notice of his want of authority, and cannot treat it as the obligation of the principal unless he can prove the existence of some special and extraordinary authority on the part of the agent. For these reasons, the testimony offered by the defendants to show that cashiers' checks when used in the private transactions of bank cashiers are by usage regarded as cash was properly excluded. If the tendency of the testimony was to establish an usage to the effect that such payments are regarded by bankers as ordinary payments of cash made by individuals for their own account, the usage would contravene well-settled legal principles. In any other aspect the testimony was immaterial.

190 The views thus expressed are pertinent in considering whether the instructions given to the jury were correct respecting the title acquired by the defendants to the checks and the moneys the checks represented. If the instructions did not accurately present to the jury the legal principles by which upon the evidence the rights of the parties were to be determined, they certainly did no injustice to the defendants. The case was put to the jury upon the theory that the defendants in taking the checks occupied the position of purchasers of commercial paper, and as though their liability was to be tested by the rule applicable to actions for the wrongful conversion of such paper. If they acquired title to the checks as against the bank, of course they acquired title to the proceeds, and if they were *bona fide* purchasers their title was perfect; otherwise they became liable for the proceeds as for a conversion. (Comstock *vs.* Hier, 73 N. Y., 269.) The defendants were given the full benefit of the distinction between negligence and *mala fides* in the purchase of negotiable paper, and the jury were instructed that mere suspicion on the part of the defendants was not sufficient to charge them with notice that Warner was using the checks without authority. The doctrine of Simmonds *vs.* Goodman (20 How'd, 343) was adopted as applicable to the facts. The facts in evidence certainly justified the submission of the question to the jury whether the defendants did not have notice that Warner was availing himself of fiduciary powers to use the funds of the corporation for unauthorized purposes. As the checks were made payable to the order of the defendants for Warner's individual

191 use, in legal effect they were made payable to Warner's own order. The defendants knew that he was not acting within

the scope of any ordinary agency when he made checks officially for use in his private transactions. The authority of a cashier to represent the bank does not extend to a contract involving the payment of money not loaned by the bank in the ordinary way. (U. S. Bank *vs.* Dunn, 6 Pet., 51; United States *vs.* City Bank of Columbus, 21 How'd, 356; Merchants' Bank *vs.* State Bank, 10 Wall., 604) As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. Authority to use its credit or transfer its funds for his private use cannot be implied from the fact that his official position puts it within his power to act dishonestly in this behalf.

Although the defendants were bound to know when they took the checks that the paper could be treated as the paper of the bank unless the managers of the bank had loaned him the money represented by it, there was evidence which, unexplained, tended to show that such a loan had been in fact made. The evidence consisted in the circumstances that the checks were drawn upon the regular correspondent of the bank, were drawn frequently, were for large amounts, and the transactions extended over a considerable period of time. These circumstances indicated the improbability that the cashier was acting clandestinely or criminally, and suggested that he was acting with the acquiescence of the directors or that the directors were grossly inattentive to their duties. If the circumstances were sufficiently notorious and peremptory to preclude any other theory than that the directors were aware of what was being
192 done, and were not such as to imply that the directors were wilfully ignoring their duties and acting collusively with Warner, they would afford sufficient evidence of Warner's authority to use the funds of the bank as he did and would have justified the defendants in relying upon the ostensible authority evinced by the acquiescence and recognition of the directors. As was said by the court in Martin *vs.* Webb, 110 U. S., 14: "It is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties without his authority to do so being in writing or appearing upon the record of the proceedings of the directors. His authority may be by parol and *collected* by circumstances. It may be inferred upon the general manner in which for a period sufficiently long to establish a settled course of business he has been allowed without interference to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation as represented by the board of directors. When during a series of years or in numerous business transactions he has been permitted without objection and in his official capacity to pursue a particular course of conduct, it may be presumed as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot in justice to those who deal with the bank shut their eyes to what

is going on around them. It is their duty to use ordi-
193 nary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. * * * That which they ought by proper diligence to have known as to the general course of business in the bank they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that cou-se of business." The defendants could rightfully assume that the directors of the Albion Bank did use reasonable diligence in acquainting themselves with the state of its account with its principal agent, the New York bank, and did exercise proper control and supervision generally in the management of its affairs; and the fact that Warner was nevertheless able to use the funds of the bank in such large amounts for so long a period of time and through the medium of the regular correspondent of the bank was inexplicable except upon the theory of the acquiescence of the directors or of their guilty complicity with him, or of the existence of an extraordinary laxity on their part in the conduct of the affairs of the bank. The defendants, however, chose to rely upon appearances instead of seeking authentic information. They were not certain, and could not be from the nature of the case, whether, notwithstanding appearances, the directors were not being deceived by Warner and were not in fact ignorant that he had ever made any use — the checks in question. It was incumbent upon the defendants to show that the directors knew and acqui-sced in what was being done by Warner before they could rely upon his official signature. The evidence raised
194 a presumption of such knowledge and acquiescence on the part of the directors, but did not show it conclusively. It presented a question of fact for the consideration of the jury, and the jury found, as the evidence fully warranted them in doing, that the directors were ignorant of Warner's acts. As is stated in Wharton on Agency (sec. 129): "The pretension by an agent to extraordinary or peculiar powers is by itself sufficient to arouse suspicion." When the transaction is such as should arouse suspicion of the agent's authority to represent his principal, it is the duty of those who deal with him in a representative character to apply to his principal for information. The defendants did not choose to take the safer course; they preferred to rely upon the evidence of Warner's authority, evinced by the fact and circumstances, which tended to show that the directors must have known of and consented to his use of the funds of the bank. The jury found not only that the directors did not know this, but also found that the defendants did not believe when they took the checks that Warner was authorized to make them by his co-managers of the bank. The doctrine that a purchaser of negotiable paper acquires a good title if he acquires it for value and honestly, notwithstanding he may have been grossly negligent in failing to make proper inquiries, has no application to a case like the present. A purchaser of commercial paper made by an agent cannot acquire any title to it as against the principal unless he is able to show that it is the

paper of the principal made by the agent by due authorization. When he has information that the agent who has made the
195 paper has made it in the name of the principal for his own use he must be prepared to show that special authority in that behalf has been delegated by the principal, and cannot rely upon the implied authority of the agent to make such paper in the ordinary business of the principal.

In accordance with these views the defendants were not entitled to the instruction that they were only liable if the jury found they took the checks with guilty knowledge that Warner had no authority to use them, and it would have been proper to instruct the jury that the plaintiff was entitled to a verdict if they found that Warner had no authority, actual or ostensible, to use them.

It is insisted for the defendants that, inasmuch as the checks were paid by the New York bank out of funds in part contributed by Warner himself, the Albion Bank was not a loser of the face amount of the checks, and the plaintiff ought not to recover beyond the extent that the checks were paid out of the moneys of the Albion Bank. The evidence did not indicate that the New York bank had any notice that the checks were not put out by Warner in the course of the ordinary business of the bank; consequently when they were presented to and collected of the New York bank the latter became a *bona fide* holder for value, and the Albion Bank became liable to it for the face amount of the checks.

Several of the adjudications which decide that the maker of commercial paper can maintain an action for conversion against the person who, with notice that it has been put fraudulently into circula-
196 tion, negotiates it to a *bona fide* holder for value also decide that he can recover the amount of the paper without averring or proving that he has paid it to the holder, and that it is enough *prima facie* that he has become liable to pay it to entitle him to recover the face amount. Decker *vs.* Mathews, 12 N. Y., 313; Evans *vs.* Kyner, 1 Barn. & Adol., 528; Payne *vs.* Pritchard, 2 C. & P., 558. It has been held that the defendant may prove the insolvency of the maker, and thereby lessen the damages; but in the absence of evidence of any want of ability of the maker to pay, the presumption is that he is able to pay the paper and will be obliged to do so. Potter *vs.* Merchants' Bank, 28 N. Y., 641. It is enough for him to show that he has incurred a liability to pay the amount by the wrongful act of the defendant, but if the facts are such that this liability will not result in actual loss he will only be entitled to recover nominal damages. The law presumes that loss will follow liability; consequently it is for the defendant to overcome the presumption by evidence which will take the case out of the ordinary category.

A check is not only a bill of exchange upon which an action can be maintained against the drawer by the drawee who has paid it, but is a bill which is presumed to be drawn on actual funds and appropriates the funds to the drawee upon payment. Undoubtedly, in an action for the wrongful conversion of such paper, if the defendant proves that payment of the check was refused by the

drawee; that it has never reached the hands of a *bona fide* holder, and that he is ready to surrender it to the maker upon the
197 trial, these facts would go in mitigation of damages, and the recovery of the plaintiff would be limited to his actual loss. If in the present case the action was merely for the conversion of the checks the plaintiff would be entitled to recover their face upon proof that they were paid by the New York bank without more, but the action is for the money of the Albion Bank obtained upon its checks "paid by the New York bank out of and from the moneys and accounts of the Albion Bank." If the evidence established that the checks were not paid by the New York bank out of the moneys or funds of the Albion Bank, but were paid out of moneys provided for that purpose by Warner, the jury should have been instructed that their verdict could be only for nominal damages; but the payment of the checks by the New York bank was none the less a payment by the Albion Bank or a payment out of its funds, because the latter was put in funds without the knowledge of its officers, and its correspondent paid the checks without their knowledge. If Warner had made deposits in his own name with the New York bank and that bank, pursuant to his instructions, had charged the checks when it paid them against his account, the defendants might well insist that the checks were not paid by the Albion Bank or out of its funds. Under such circumstances the plaintiff would certainly be required to prove that the deposits made by Warner were funds of the Albion Bank; but when Warner caused deposits to be made with the New York bank in the name of the Albion Bank, the title to the fund created by the deposits vested in the latter as against Warner. When the New York bank credited the Albion Bank with these deposits it assumed the relation of a debtor,
198 not to Warner, but to the Albion Bank, for the amount; and when it paid checks drawn against the fund and charged them to the Albion Bank it paid them out of the funds of the Albion Bank as between itself and the Albion Bank and as between the latter and Warner. It may be that third persons whose moneys were misappropriated by Warner and deposited with the New York bank to the credit of the Albion Bank can reclaim the amount of the Albion Bank, but Warner himself could not, because he relinquished his title by his own act. Whether the deposits made by him are to be regarded as the property of the Albion Bank because made by a fiduciary who has wilfully commingled his own funds with the trust funds in such a manner that the line of distinction between them cannot be traced, or as voluntary payments which he cannot reclaim because they were voluntary, need not be considered. He doubtless made them to conceal his use of the funds of the bank, knowing that he could not overdraw the account of his bank with the New York bank without risk of detection.

The defendants have no interest in the question whether the Albion Bank paid the checks out of the moneys for which it is accountable to third persons, or even out of the money for which it may be accountable to Warner. It suffices that the checks were paid out of funds to which it had the legal title. Nor is it material

that the defendant- paid to Warner various sums of money which were ultimately received by the Bank of Albion. It was open to the defendants to show upon the trial that the Albion Bank did not eventually sustain any loss by Warner's misappropriations of
199 its checks or moneys and thus reduce the plaintiff's recovery to nominal damages. This they did not attempt, otherwise than by showing that Warner deposited various sums of money to the credit of the Albion Bank which were not charged by that bank to the New York bank. The presumption is as cogent that these deposits, secretly made by Warner, represented the moneys which he knew belonged to the Albion Bank as that they were his own money. The case for the plaintiff was complete when it appeared that the checks which were wrongfully received and collected by the defendants had been paid by the New York bank out of the funds standing to the credit of the Albion Bank. He was then entitled to recover the full amount. It was unnecessary for him to assume the affirmative and show that the deposits made by Warner in the New York bank were not the funds of Warner, but consisted of misapplied funds of the bank or the proceeds of securities belonging to it or for which it was responsible to others; but it was for the defendants to prove that, notwithstanding their wrongful participation with Warner in misappropriating the funds of the bank, the bank did not suffer loss. If they had shown that all his misappropriations had been made good by the return of what he has misapplied, it is not entirely clear that they would have been liable only for nominal damages. Helmer *vs.* Wilsey, 17 Wend., 91; Otis *vs.* Jones, 21 Wend., 394; The People *vs.* Bank of North America, 75 N. Y., 547. These cases hold that the defendant in an action for conversion of property can only claim a mitigation of damages because of a return of the property where the owner has accepted its return
200 or has resumed dominion over it as owner, and that it is not enough that the property without his consent has been applied to the satisfaction of his debts. It is not necessary to consider whether this doctrine should be applied to a case for the conversion of money which has been returned to the owner and used by him without knowledge of the conversion or restitution. Here all the money returned by Warner was insufficient to replace his defalcations by an amount much larger than the sum sought to be recovered of the defendants, and the bank had no knowledge that he had returned anything to replace what he had misapplied until he had again misappropriated it. It is not unjust or unreasonable to compel the defendants to restore such of the funds of the bank as they received when they are unable to prove that the bank was not directly or ultimately a loser in consequence of their acts. It may be that Warner would have misappropriated the money of the bank in other ways if they had refused to receive the checks, but certainly one temptation would not have been in his path if he had found that he could not use the paper of the bank for his speculations with the same facility as though it were his own money.

Several points discussed upon the motion for a new trial, among them the point that the jury should have been instructed not to

include interest in their verdict accruing before the commencement of the suit, do not seem to merit consideration. The views expressed cover all the controlling questions in the case and lead to a denial of the motion.

Endorsed: U. S. circuit court, southern district of N. Y.
201 Anderson, receiver, *vs.* Kissam *et al.* Opinion. Wallace, J.
U. S. circuit court. Filed Aug. 13, 1888. John A. Shields, clerk.

202 Circuit Court of the United States for the Southern District of New York.

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion,
against
SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURN.

Know all men by these presents that we, Cornelius Vanderbilt, of the city of New York, and George W. Vanderbilt, of the same place, are held and firmly bound unto Henry J. Anderson, as receiver of the First National Bank of Albion, in the sum of two hundred thousand dollars; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 21st and 24th days of September, one thousand eight hundred and eighty-eight.

Whereas the above-named Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of New York:

203 Now, therefore, the condition of this obligation is such that if the above-named Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. VANDERBILT. [L. S.]
GEO. W. VANDERBILT. [L. S.]

STATE OF RHODE ISLAND & *County of Newport*, } *ss:*

Cornelius Vanderbilt, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and freeholder within the southern district of New York, and is worth the sum of four hundred thousand dollars over and above his debts and liabilities and exclusive of property exempt by law from execution.

C. VANDERBILT.

Sworn to before me this 21st day of September, 1888.

DARIUS BAKER,
[SEAL.] *Notary Public.*

STATE OF MAINE,
County of Hancock, } *ss:*

George W. Vanderbilt, one of the subscribers to the foregoing undertaking, being duly sworn, says that he is a resident and freeholder within the southern district of New York, and is worth the sum of four hundred thousand dollars over and above his debts and liabilities and exclusive of property exempt by law from execution.

204

GEO. W. VANDERBILT.

Sworn to before me this 24th day of September, 1888.

WILLIAM P. FOSTER,
[SEAL.] *Notary Public.*

STATE OF RHODE ISLAND &
County of Newport, } *ss:*

On this twenty-first day of September, 1888, before me personally came Cornelius Vanderbilt, to me personally known and known to me to be one of the individuals described in and who executed the foregoing undertaking, and acknowledged to me that he executed the same for the uses and purposes therein mentioned.

DARIUS BAKER,
[SEAL.] *Notary Public.*

STATE OF MAINE,
County of Hancock, } *ss:*

On this twenty-fourth day of September, 1888, before me personally came George W. Vanderbilt, to me personally known and known to me to be one of the individuals described in and who executed the foregoing undertaking, and acknowledged to me that he executed the same for the uses and purposes therein mentioned.

205

WILLIAM P. FOSTER,
[SEAL.] *Notary Public.*

STATE OF MAINE,
Hancock, } *ss:*

I, Hutson B. Saunders, clerk of the supreme judicial courts in said county, certify that W. P. Foster, Esquire, is and was at the date of his certificate an acting notary public in and for said county, duly commissioned and qualified to act as such, and that the signature to the paper annexed purporting to be his is genuine, and that he is duly authorized and empowered by the laws of said State to take acknowledgment of deeds, assignments, and powers of attorney and to administer oaths.

In testimony whereof I have hereunto set my hand and affixed the seal of the supreme judicial court for said State this
[L. S.] twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

H. B. SAUNDERS, *Clerk.*

206 (Endorsed:) Circuit court of the United States for the southern district of New York. Henry J. Anderson, as receiver of the First National Bank of Albion, against Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn. Bond. The within bond is approved as to form and amount and sufficiency of the sureties for the bringing of the writ and for a stay of execution on the judgment. N. Y., Oct. 1st, 1888. E. Henry Lacombe. We consent to the approval of the within bond. Dated N. Y., Sept. 28, 1888. Wm. A. Beach, pl'ff's att'y, per Geo. W. Wingate, of counsel. U. S. circuit court. Filed Oct. 1, 1888. John A. Shields, clerk.

207 Supreme Court of the United States.

SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURN, Plaintiffs in Error,
against
HENRY J. ANDERSON, as Receiver of the First National Bank of Albion, Defendant in Error.

And now the said Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn, by John E. Burrill, their attorney, says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid was given for the said Henry J. Anderson, as receiver of the First National Bank of Albion, against the said Samuel
208 H. Kissam, Henry N. Whitney, and Eugene R. Washburn, whereas by the law of the land the judgment ought to have been given for the said Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn against the said Henry J. Anderson, as receiver of the First National Bank of Albion; and the said Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of such judgment.

JOHN E. BURRILL,
Attorney for Plaintiffs in Error.

New York, October 1st, 1888

(Endorsed:) Supreme Court of the United States. Samuel
209 H. Kissam, Henry N. Whitney, and Eugene R. Washburn, plaintiffs in error, against Henry J. Anderson, as receiver of the First National Bank of Albion, defendant in error. Assignment of error. Due and timely service of a copy of within assignment of error is hereby admitted. New York, Oct. 1st, 1888. William A. Beach, attorney for defendant in error. U. S. circuit court. Filed Oct. 2, 1888. John A. Shields, clerk.

210 Supreme Court of the United States.

SAMUEL H. KISSAM, HENRY N. WHITNEY, and EUGENE R. WASHBURNE, Plaintiffs in Error,
against
HENRY J. ANDERSON, as Receiver of the First National Bank of Albion, Defendant in Error.
} Joinder in Error.

And afterwards, to wit, on the fourth Monday of October, in said term, the said defendant in error, by William A. Beach, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

WILLIAM A. BEACH,
Attorney for Defendant in Error,
Office of Wingate & Cullen, 20 Nassau Street, New York City.

211 [Endorsed:] United States Supreme Court. Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburne, plaintiffs in error, *vs.* Henry J. Anderson, as Receiver of the First National Bank of Albion, defendant in error. Joinder in error. William A. Beach, attorney for defendant in error, office of Wingate & Cullen, 20 Nassau street, New York city. Due service of a copy of the within joinder in error is hereby admitted this 20 day of October, 1888. Burrill, Zabriskie & Burrill, attorneys for plaintiff-in error. To —— ——, attorney for plaintiff- in error. U. S. circuit court. Filed Oct. 2, 1888. John A. Shields, clerk.

212 By the Honorable E. Henry Lacombe, judge of the circuit court of the United States for the southern district of New York, in the second circuit, to Henry J. Anderson, as receiver of the First National Bank of Albion, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October next, pursuant to a writ of error issued to the circuit court of the United States for the southern district of New York, in the second circuit, and filed in the clerk's office of the last-named court, wherein Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

213 E. H. LACOMBE,
Circuit Judge.

Dated New York, Oct. 11, 1888.

2131/2 [Endorsed:] E. & A. A. 779. Supreme Court of the United States. Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn, plaintiffs in error, against Henry J. Anderson, as receiver of the First National Bank of Albion, defendant in error. Citation. Due and timely service of a copy of within citation is hereby admitted. New York, Oct. 1st, '88. William A. Beach, attorney for defendant in error. U. S. circuit court. Filed Oct. 2, 1888. John A Shields, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 202. Samuel H. Kissam, Henry N. Whitney, and Eugene R. Washburn, plaintiffs in error, *vs.* Henry J. Anderson, receiver of the First National Bank of Albion. Filed October 11, 1888.

Office Supreme Court U. S.
FILED,
MAR 7 1892
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 202.

OCTOBER TERM, 1891.

SAMUEL H. KISSAM AND OTHERS,
Plaintiffs in Error,

vs.

HENRY J. ANDERSON,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

JOSEPH H. CHOATE,
JOHN E. BURRILL,
GEORGE ZABRISKIE,
Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

UNITED STATES SUPREME COURT.

SAMUEL H. KISSAM, HENRY N. WHITNEY and EUGENE R. WASHBURN,
Plaintiffs in Error,

AGAINST

HENRY J. ANDERSON, as Receiver of the First National Bank of Albion,
Defendant in Error.

Brief for Plaintiffs in Error.

Statement.

This is a writ of error to the United States Circuit Court for the Southern District of New York, Second Circuit. The plaintiffs in error (the defendants below) are partners under the name of Kissam, Whitney & Co., and for many years have been and are bankers and brokers in the City of New York.

The First National Bank of Albion was organized under the National Banking Law December 26, 1863, and was reorganized February 24, 1883, under the act of July 12, 1882 (marg, p. 97), and was located and transacted business at Albion in Orleans County, State of New York.

The Third National Bank of the City of New York was the correspondent of the Albion Bank in that City, and the account between these two banks had been in existence for 20 years prior to and up to the failure of the Albion Bank.

The Albion Bank failed and closed its doors August 22, 1884, and the defendant in error was appointed its Receiver on August 26, 1884 (marg. paging 97).

This action was commenced January 7, 1885. It was tried before Hon. W. J. Wallace, U. S. Circuit Judge, and a jury, who rendered a verdict for the plaintiff for $147,759.71 of which $103,000 was principal and $44,759.71 was interest.

A motion for a new trial was made and denied, and judgment on the verdict was entered, with costs, for $151,456.32.

The opinion of the Court on the motion for new trial will be found in Record, marg. paging 182 *et seq.*

Pleadings.

The complaint (Record, marg. p. 10), after stating the organization of the Albion Bank and its failure and the appointment of the Receiver, alleged, in substance, that during the period covered by the transactions in controversy (May 11, 1880, to August 26, 1881), Albert S. Warner was either cashier or president of the Albion Bank, and that he was engaged in stock transactions in New York City, in which the plaintiffs in error acted as his brokers, and that the moneys of the bank were used by him in such transactions. It charges that "such *moneys* were so supplied and furnished by the delivery to the defendants by checks drawn on the Third National Bank aforesaid, and signed by Warner as cashier or president, and in some instances sending to said defendants *moneys* by express."

The complaint then, in thirteen counts, sets forth thirteen checks or drafts, all drawn by Warner as such cashier on the Third National Bank, payable to the defendants or order; each count including one check. The first draft in the series on which recovery was had

is dated May 11, 1880, and the last is dated August 26, 1881 (Record, marg. pp. 10 to 23).

Each of these thirteen counts is substantially the same in form, and in each it is charged that the draft was delivered to Kissam, Whitney & Co., who endorsed the same and received the amount thereof from the Third National Bank "*out of and from the moneys and account of the said Albion Bank, had and kept by it with the said Third National Bank*" (Record, marg., p. 10).

The complaint contained other counts, fourteenth to forty-first inclusive (Record, marg., pp. 23 to 49), based on other checks and on moneys alleged to have been collected thereon and on moneys alleged to have been sent to defendants by express.

Such counts allege the delivery to the defendants of "moneys, funds and assets of and belonging to the said Albion Bank," and "that the said defendants knew when they so received and used the same that they were the moneys and assets of the Albion Bank."

No recovery was had on any of these last-mentioned counts, and they are referred to herein for the purpose of showing the nature of the action.

After setting forth the several checks or drafts the complaint (Record, marg. p. 50) alleges that the "defendants received the said checks and obtained the *moneys* on said checks with the knowledge that while said moneys and checks purported to be and to be used and drawn for the business of the Albion Bank, in fact said checks and the moneys obtained upon said checks were used for the private speculative account of Warner; and that defendants had notice and were well aware that neither said Warner nor said bank had authority to speculate in stocks; and further that Warner fraudulently misapplied the moneys so as aforesaid furnished to said defendants by such checks, moneys, funds and assets"

No recovery was asked for or had upon any of the

counts except the 1st and 2d and the 4th to 13th, inclusive.

The third count was abandoned at the trial on the evidence (at marg. p. 99) that the draft in that count, $706.08, was credited on the ledger of the Albion Bank to the Third National Bank on August 14, 1880, the day of its date (see Record, marg. p. 13).

All of the checks on which recovery was had were signed by Warner *as cashier*, and were payable to the order of Kissam, Whitney & Co.

The answer admits (marg. pp. 56–8) that Warner had an account with defendants on May 1st, 1880, and that they bought and sold for him stocks, bonds and other securities on commission; and alleged,

(1.) That during the continuance of said account they had, at the request and by the direction of Warner, paid to and deposited with the Third National Bank to the credit and for the account of the Albion Bank moneys which were used by the Third National Bank and applied in paying the checks of the Albion Bank on the former bank, including the checks in suit; and,

(2.) That Warner also during the same period deposited with the Third National Bank to the credit of the Albion Bank other moneys which did not belong to the latter bank, and which were also used to pay checks of the Albion Bank on the Third National Bank, including those in suit.

(3.) The answer also in respect to each check denies that the check was paid out of moneys of the bank of Albion in the hands of the Third National Bank, or out of any moneys furnished by the Albion Bank and says that the same were paid; but out of moneys deposited by Warner or by the defendants by his direction, and that any moneys of the Albion

Bank which may have been temporarily used in the payment of these checks was refunded and repaid by deposits to the credit of the Albion Bank in the Third National Bank.

(4.) The answer also denies (marg. p. 58) that the defendants received from Warner or applied to his use in any way any *moneys, assets or funds* of the Albion Bank, and also denies (marg. pp. 89, 90) the charges of fraud or notice, or that any checks or moneys had been received with knowledge that they had been improperly issued or used, and alleged that defendants acted in good faith.

Facts Established by the Evidence.

I.

The Albion Bank was owned by the Burrows family, and its management was entrusted to Warner exclusively, and the directors and officers exercised no supervision over its affairs.

(I.) The Albion Bank was organized under the General National Banking Act in December 22d, 1863, and was reorganized February 24th, 1883, under the Act of July 12th, 1882.

The entire capital of the bank with the exception of twenty shares was owned by R. S. Burrows during his life, and by his executors after his death. The bank was at all times controlled and "run" by the Burrows family and after his death by Warner, his managing executor (Record, marg. pp. 97, 103, 146). In 1878 R. S. Burrows was president, Alexander Stewart, a son-in-law, was vice-president, and Warner was cashier. At the death of Burrows, March 29th, 1879, Stewart became president, and so continued until he died, November 20th, 1881. After the last check in judgment was sent to the

defendants, Warner became president, and W. R. Burrows, a son of R. S. Burrows, became cashier, and continued to be such until January, 1884, within a few months prior to the failure of the bank (Record, marg. p. 144).

There were but five directors of the bank, and they consisted of R. S. Burrows and his family, and after his death, of his executors; of Warner and a clerk in the bank (Record, *Ib.*). The directors, outside of the Burrows estate, did not own stock, but were qualified by the transfer of stock to their names (Record, marg. p. 145). The board met several times a year, but did not, as a general rule, examine the books or the cash (marg. p. 103). After the death of Burrows (1879), Warner really managed the bank (Record, *Ib.*). W. R. Burrows, who became cashier when Warner became president, was not at the bank very much—never opened the mails, even during the absence of Warner. The bookkeeper acted as teller; the cashier, Burrows, took no part in the management of the bank, and everything was left to Warner (Record, mar. pp. 148-9). Although it was proved that the Third National Bank hereinafter mentioned, which was the correspondent in New York of the Albion Bank, sent to the latter *monthly statements* of the accounts between the two banks, and the vouchers (marg. pp. 99-100) such statements were never checked up by the Albion Bank, so that its books would not show any discrepancy between the two accounts. These statements were never compared with the books of the Albion Bank to see if they were correct (Record, *Ib.*). The vouchers consisting of checks and drafts returned by the New York Bank were kept in a vault of the Albion Bank. "All of us had partly charge of that vault" (Coan Test., Record, marg. p. 102). From 1873 until the failure of the bank in 1884, no attempt was made to compare the returns made by the Third National Bank with the ledger account kept in Albion to ascertain whether the latter

was right or wrong (Coan Test., Record, marg. p. 100).

Such returns "had not been checked for several years before 1878. If the statements came when Warner was absent, they were laid aside and not opened until he returned. A good many of them were found never to have been opened at all" (*Ib.*).

"The *vouchers* sent by the Third National Bank came sealed up and were put into the vaults of the Albion Bank and were never opened unless by Warner, he rarely compared the vouchers themselves. We would take up the statement and if the account balanced and there were no errors, we took the account as correct." We did not know whether the books of the Third National Bank agreed with ours. We supposed they did. They showed a balance all the while. We found out from our books how much balance we ought to have. We never tried to ascertain whether their books showed a similar balance" (Coan Test., Record, marg. pp. 146 to 149). It was proved that the bank paid dividends regularly (West Test., marg. p. 161). It also appeared that the affairs of the bank were regularly examined by the official Examiner (Coan Test., marg. p. 103).

Defendants offered to show that there were in the possession of the Albion Bank, its officers and directors, information, or means of information, upon which they could draw when it became necessary for the purposes of the examination by the Bank Examiner. The Court excluded the evidence, and defendants excepted (marg. p. 104).

II.

Account of Albion Bank With Third National Bank of New York.

During all the period covered by the matters in the complaint mentioned and for 20 years prior thereto, the Albion Bank had kept a general account with the

Third National Bank of New York, "the same as any country bank will keep with a New York Bank. The Albion Bank remitted to the New York bank currency, drafts for collection, drafts on New York and such" (Record, p. 54), and drew checks and drafts on the Third National Bank (Record, marg. p. 98).

"When the Albion Bank sent money to the Third National Bank it was charged to the latter. When the Albion wanted money in ordinary business, it drew on the Third National and credited it with the amount *when the draft was drawn* (Record, marg. p. 99). The Albion Bank never transmitted statements to the New York Bank, but the latter transmitted statements to the Albion Bank." The statements were sent monthly and the vouchers sent once in three months (marg. p. 99). These statements were never compared with the Albion books to see if they were correct (Record, marg. p. 99). Five sets of monthly statements, one for each of the years 1880 to 1884, inclusive, were produced and used at trial (marg. p. 100).

In the business of the Albion Bank (marg. p. 102) drafts on the Third National Bank were drawn by the president, vice-president, cashier and teller. The party receiving the money for the draft would sign and deliver the draft, and in such case the draft would be entered, but no other entry would be made on the Albion books (Record, marg. p. 101). If the draft was not entered and should be paid by the New York Bank, the Albion Bank would hear of it in the ordinary course of business between the two banks when the draft was returned and also when the monthly statements furnished by the New York Bank were received (Record, marg., p. 102). The returned drafts were kept in the vault of Albion Bank, and all had partly charge of it, but Warner had absolutely, and of the safe (marg. p. 102). The statements were never checked by the Albian Bank, because it was behind on its work (p. 99).

Although the accounts between the two banks had

continued for twenty years prior to the failure of the Albion Bank in 1884 such accounts had *never been settled* during all that time. The only difference in the accounts as kept by the two banks during all this period was that on the 23d of August, 1884, when the Albion Bank failed, the account kept by it showed a credit to it of $5,195.73, whereas the Third National Bank accounts showed a debit to the Albion Bank of $5,134.12 (Anderson Test., Record, marg., pp. 69, 126). The above credit balance on the Albion books of $5,195.73 was transferred to the Receiver, and the claim of the Third National against the Albion was settled by a payment of the same by the Burrows Estate to the Third National, and the accounts between the two banks were thus closed, and no steps were taken by the Receiver to open that settlement (Record, marg., pp. 127–8).

The agreement between the accounts kept by the two banks, with the slight difference above stated, resulted from the fact that the checks in suit and some other checks drawn by Warner, in his official capacity, on the Third National Bank, amounting to $267,782.53 which were paid by it and charged to the Albion Bank on the books of the Third National Bank, did not appear on the Albion books, and that large sums of money deposited by Warner, or by his direction, in the Third National to the *credit of the Albion Bank*, amounting to $281,169.65, which were credited to the Albion Bank, and used in paying such checks, did not appear on the Albion books.

A statement of such deposits and payments was made up by the Receiver and put in evidence (Record, marg., pp. 129 to 133). Such statement, which is corroborated by the evidence, shows that a large part of these moneys so deposited to the credit of the Albion Bank, and used by the Third National Bank, were deposited by the defendants in this action as hereinafter stated. The precise sum deposited by them was $89,138.06. *None of said moneys came from the Albion Bank or its*

moneys, funds or assets. The residue of the moneys so deposited with the New York Bank to the credit of the Albion Bank was deposited by Warner. On the evidence no part of such moneys came from the latter bank, or out of its money, assets or funds, as will hereafter be shown.

III.

Account of Kissam, Whitney & Co. With Warner.

Plaintiffs in error kept with Warner a banker's and broker's account—a single account—in which all their transactions as bankers or brokers were entered. In such account all moneys from time to time received by them from or for account of Warner, including the checks in suit, were credited to Warner, and all moneys paid by his direction or for him were debited to him in said account (Record, marg., p. 116).

Such account included moneys received from Warner aside from moneys derived from stock transactions and moneys paid out on his account disconnected with stock transactions. All moneys received from and paid to or for him were charged to general account. Moneys paid to or for Warner were to a great extent paid by drafts drawn on them by Warner which specified to whom the draft was to be paid, and the defendants paid all drafts by checks on their own bank, drawn to the order of the payee in the drafts or the endorsee thereof (Record, marg., pp. 116–117).

The account between the defendants and Warner was opened in the following manner: On November 22d, 1879, Warner opened an account with Chase & Atkins, bankers and brokers in New York, which continued until May 11th, 1880, when that firm went out of business and turned over their business to the defendant's firm, which was formed at that time. Washburn and Whitney were clerks in the old firm,

but Kissam was not connected with it. (Record, marg., pp. 136-157). The defendants took Warner's account with the securities belonging to it, and paid Chase & Atkins $348,086.19, which was the amount for which that firm held them. Of course this was not the amount of Warner's indebtedness, but included the cost price of the securities, the value of which would be deducted from that sum to fix the amount as such indebtedness (113-116-165-166). When the account with Chase & Atkins was opened by Warner he stated that other persons were interested with him in the account, and that he was to manage it.

On the faith of that statement Chase & Atkins opened the account, and they repeated that statement to defendants when the business was about being transferred to them (Washburn Test., Record, marg., p. 120; Atkins test., *Ib.*, marg., p. 165; Chase test. Record, marg., p. 166; Whitney test., Record, marg., p. 157.

The account with Chase & Atkins was opened by a remittance of $5,000, and, prior to the transfer of the account to defendants, Warner had delivered to that firm five checks like those in suit, which are set forth in the statement (Record, marg. p. 129). (The dates in the statement are those when the checks were paid by the Third National and not the dates of the checks themselves).

All the checks in suit on which recovery was had, amounting to $103,000, were received by Kissam, Whitney & Co. between May 13, 1880, and August 29, 1881, more than four years before the commencement of this action, which was the first and only notice given to defendants that there was any question about the checks. All of these checks, as well as all moneys received by Kissam, Whitney & Co. from Warner or paid by them for him, were duly acknowledged by that firm, and statements thereof, and of all purchases and sales made by them for him were regularly sent by them to

him at Albion (Washburn's test., marg., pp. 123–137). The account with Warner never was as large after it opened as it was when opened. It was a *decreasing* account all the time (marg., p. 139). The stock transactions between Warner and the defendants ended August 26, 1881 (Record, marg., p. 138), but the account between them was not finally closed until August 12th, 1884. The *whole amount* of commissions included in defendants' account with Warner, from beginning to end when his account was finally closed, is a little less than $7,000, which covers all their compensation for the entire account from the beginning to the close (Washburn's test., marg., pp. 139-140, 141).

IV.

Moneys for which Plaintiffs in Error claim Credit.

1. As before stated, the *checks in suit*, although appearing on the books of the Third National Bank, did not appear on the books of the Albion; and, as the accounts between the two banks as kept by them respectively, differed only in the sum of about $5,000, it necessarily follows that the funds for the payment of these checks must have been provided in some manner. It was proved that, subsequent to the first check received by defendants from Warner, they had paid his drafts on them, "payable to the Third National Bank to the credit of the Albion Bank," by their own checks drawn on their own bank (the Bank of New York), to the order of the Third National Bank, or to the order of that bank "to the credit of the Albion Bank," all of which were paid and were creditd by that bank to the Albion Bank, and appear in the monthly statements furnished by the Third National Bank to the Albion Bank and are there stated to have been so deposited by Kissam, Whitney & Co. (Coan Test., marg. p. 105). *None of these checks except two*

are entered on the books of the Albion Bank. The checks were read in evidence; amounted to $89,202, and were marked Exhibits "F" to "S" (Record marg., p. 106), and are as follows:

1881.	April 4	$8,000 00	Ex. G
"	April 14	5,590 00	Ex. H
"	April 23	9,200 00	Ex. I
1882.	April 3	10,000 00	Ex. J
1883.	March 7	5,000 00	Ex. K
"	April 17	6,000 00	Ex. L
"	Nov. 15	4,000 00	Ex. M
"	" "	5,000 00	Ex. N
"	Nov. 21	8,000 00	Ex. O
"	Dec. 31	7,850 00	Ex. P
1884.	March 7	5,000 00	Ex. Q
"	April 11	5,000 00	Ex. F
"	July 28	8,000 00	Ex. R
"	" "	2,562 00	Ex. S
		$89,202 00	

2. In addition to the above checks, the defendants also proved remittances made by them to Warner, of coin and currency, amounting to $45,922.26, the particulars of which are stated in the Defendants' Exhibits F^2 to L^2, inclusive (Record, marg., pp. 121).

3. And in addition thereto, defendants also proved the payments of Warner's drafts, amounting to $17,978.37, the particulars of which are stated in the Exhibits M^2 to T^2, inclusive (Record, marg., p. 122.). These last are important as bearing on the object for which some of the other checks were given.

4. In addition to the foregoing, other moneys were deposited by Warner in the Third National, and credited on its books and in its monthly statements to

the Albion Bank, which do not appear in the books of the Albion Bank (Record, marg., p. 105), as follows:

1880.	Oct. 16th.	Bank of New York	$ 14,000.00
"	" 29th.	Merchants Bank of Baltimore	20,000.00
1881.	Aug. 24th.	Central Trust Company.	27,307.60.
"	June 30th.	Coin	5,000.00

It was proved that the Albion Bank had no dealings with the Bank of New York nor with the Merchants' Bank of Baltimore, nor with the Central Trust Co., and there was no claim or pretense that these moneys were not the individual moneys of Warner (Marg., p. 108-9).

5. It was proved (marg., p. 122) that the item, October 16, 1880, Bank of New York, $14,000, was part of a loan procured by the defendants from that bank for Warner on securities furnished by him. The loan was $30,000—and was made October 15, 1880, and $14,000 of it was deposited with the Third National Bank to the credit of the Albion Bank. When the loan became due, January 25, 1881, the defendants, at the request of Warner, paid the loan, amounting to $30,000, by their own check of that date (see Exhibit E 1, Record, marg., pp. 118-122, 123). The securities on which the loan was made were received by defendants when they paid the loan, and were delivered to Warner (marg., p. 124-140). There was no claim or pretense that the securities on which said loans were obtained belonged to the Albion Bank. One of the checks in suit, Exhibit No. 15, for $10,000, January 24, 1881, was sent to the defendants to be used, and was used, in paying that loan (marg., p. 141). The Court charged defendants with the $10,000 check (see Record, marg., p. 168) and refused to credit them with the $14,000, and excluded the check for the latter sum (marg., p. 119).

6. Besides the amounts deposited by the defendants by their checks to the order of the Third National Bank to the credit of the Albion Bank they proved payments by them of Warner's drafts on them in favor of various parties, amounting in the aggregate to $89,138.06, and the particulars of which appear in the case (marg., pages 118, 119) and the Exhibits T to Z and from A^1 to Z^1 and A^2 to E^2. In those payments is included the item of $30,060 paid to the Bank of New York January 25, 1881, Exhibit E^1, and among the other amounts are payments to various banks in the City of New York and elsewhere.

7. The ruling of the Court (Record, marg., p. 143), that the defendants were not entitled to the benefit of any moneys deposited by them by Warner's directions or by other parties by like directions in the Third National Bank, to the credit of the Albion Bank or to the benefit of any moneys paid by them or by other parties by Warner's directions to the Third National Bank or Warner for account of the Bank of Albion, was made *before the plaintiff rested his case*, for the purpose of regulating and controlling the trial, and necessarily precluded the defendants from proving the circumstances under which such various payments and deposits were made or the sources from whence such moneys came, or the fact that such moneys were not the moneys of the Albion Bank and that the checks in suit were paid out of such moneys (see also, Charge, marg., pp. 174–5).

V. In addition to the evidence of the omission of the Albion Bank, its officers or directors, to examine the books and accounts of the bank, and its accounts with the Third National Bank and the vouchers returned by it, it was testified by West, a bookkeeper of the bank (marg., p. 162): "That it was very generally known in Albion, during the period covered by these checks, that Warner was operating in stocks."

VI. It was further proved (West. Test., marg., p. 163) that aside from the annual examination made by the bank examiner a special examination was made in 1883, on the reorganization of the Albion Bank, under the direction of the Comptroller of the Currency.

VII. Upon the facts of the case the defense, stated shortly, is that the defendants received the money sought to be recovered in good faith for valuable consideration, and that the Bank of Albion has sustained no loss thereby.

ERRORS.

The plaintiffs, in error, claim that the Court erred:

I. In the admission of evidence.

(a) as to the amount of Warner's indebtedness to the Albion Bank at the time of its failure (Record, marg., pp. 110–125).

(b) As to the necessity of breaking open safes (Record, marg., p. 124).

(c) As to the non-receipt of currency, cash or coin by the Albion Bank (Record, marg., p. 141).

(d) As to the extent of Warner's dealings with Kissam, Whitney & Co. (Record, marg., p. 115).

(e) As to the receipt by them of the Sage check (Record, marg., p. 155–159).

(f) As to the question at Record, marg., p. 160, in regard to the defendants' custom to receive checks to the order of an executor, &c.

(g) As to the refusal to admit the evidence that the bank officers had means of information (Marg., p. 104).

II. In the exclusion of evidence offered by the defendants, as follows:

(a) As to the information or means of information in the possession of the directors and officers of the Albion

Bank when required for the examination of the Bank Examiner (Record, marg., p. 103-4).

(b) As to the $14,000 check on the Bank of New York (Record, marg., p. 119).

(c) As to the questions put to Apgar, Moore, Rolston and Kissam, on marg. pages 151-153, 154, 155, as to custom and usage.

III. In the ruling (marg., p. 143 *et passim*) that the defendants were not entitled to the benefit of the amount of payments or deposits made by them or Warner in the Third National Bank to the credit of the Albion Bank.

IV. In refusing the various requests to charge or instruct the jury, stated in the Record (marg., pp. 169–171) and in several portions of the charge delivered by the Court, to which exceptions were taken as appear in the Record, (marg., pp. 171 to 174), and which will be considered.

V. To the ruling of the Court as to the allowance of interest on the amount of checks.

First Point.

The action is, in substance, an action of debt or of assumpsit for money had and received by defendants to the use of the Albion Bank and is not, as the Court erroneously construed it (Record, marg. p. 181) an action of *trover* to recover moneys of the Albion Bank wrongfully appropriated by the defendants to their own use.

I. The Court seems to have wavered in its views as to the nature of the action, as suggested by the statement in its opinion (marg., p. 197) that "the action is for the money of the Albion Bank obtained upon its checks paid by the New York Bank out of and from the moneys and accounts of the Albion Bank" in comparison with the foregoing statement (marg. p. 181) and the statement (marg. p. 190) that "the case was put to the jury upon the theory that the defendants, in taking the checks, occupied the position of purchasers of commercial paper, and as though their liability was to be tested by the rule applicable to actions for the *wrongful conversion* of such paper."

II. It is quite important, in view of the rulings at the trial, to ascertain precisely what the action is, and to bear in mind that although the Code of Civil Procedure in New York has abolished the forms of actions (§ 3339), it has preserved all the substance of the distinctions which existed at common law between the different causes of action;—between those resting on contract, express or implied, and those based on tort, and between legal and equitable causes of action.

Goulet vs. Asseler, 22 N. Y., 225, 228.

Furthermore, by that Code, in every action whether the cause of action be legal or equitable, on contract or on tort, the defendant is entitled to set up any defense whether legal or equitable.

Code Civ. Proc., § 507.

III. The action of trover cannot be maintained for the conversion of "moneys" generally, but only for the conversion of some specific chattel or chose in action which can be identified and designated.

IV. The complaint discloses a cause of action for money had and received, and not a cause of action in

trover, and, shortly stated, it is that the defendants received the money of the Bank of Albion, knowing it to be the bank's money. The checks are mentioned only to show how the money came into the defendant's possession.

1. It is alleged that moneys, "so supplied and furnished by the said Warner to said defendants' firm were, as this plaintiff is informed and believes, the moneys of the said the First National Bank of Albion, and were so supplied and furnished by the said Warner to the said defendants' firm by the said Warner, drawing and giving to said defendants his checks, drawn to the order of said defendants' firm upon the Third National Bank of the City of New York, and signed the same, A. S. Warner, Cash. First National Bank of Albion, N. Y."

2. Then it is alleged that during the period referred to, the Albion Bank "had and kept moneys and an account with the said Third National Bank of the City of New York, which fact was known to the said defendants." Then a copy of the check is set out with the averment that Warner made and delivered it to the defendants; that they received it and endorsed it and "obtained and received the money thereon from the Third National Bank of the City of New York out of and from *the moneys and account" of the Albion Bank*, and the defendants thereupon credited the amount to Warner (Marg., pp. 9 to 11).

3. After the forty-first count in the complaint are these further general allegations, intended, apparently, to refer to each count distributively: "Thatthe defendants received the several sums of money and the funds and assets aforesaid and hereinbefore specifically enumerated, and obtained the checks hereinbefore specifically mentioned, and obtained the moneys on the said checks as hereinbefore mentioned, with the knowledge. * * * that he (Warner) fraudulently misapplied for use in his said speculations the *moneys* so as aforesaid furnished to said defendants by means of said

checks, moneys, funds and assets" (Marg., pp. 50, 51).

4. The cases cited in the opinion to sustain the theory that the *liability of defendants was to be tested by the rule applicable to actions for the wrongful conversion of such paper*" (Marg., p. 190) do not sustain it (*Decker vs. Matthews*, 12 N. Y., 313). In which case the defendant, not being a party to a note, nor a holder of it, illegally and wrongfully took it from the safe of the holder and delivered it to the other defendant, who transferred it to a *bona fide* holder for value, so that the plaintiff became liable to pay it, whereas in this case the grievance alleged is that the defendant received and disposed of the *moneys* paid by the drawee of the check to them. This case is clearly distinguishable from those referred to in the opinion.

V. Under the New York Code, as well as at common law, the plaintiff below, in order to recover was bound to prove the allegations of the complaint, and was restricted to the cause of action thereon based, and could not recover on any other or different cause of action. He could not at the trial claim that the action was one for a conversion and that he was entitled to the rights and remedies which an action for conversion gave him. If the facts proved would have entitled him to bring an action for conversion, he has, by bringing the action in assumpsit, waived the tort, as was the case at common law, and the rights of both parties to the action are to be determined on the theory that the action is on contract for money had and received, and not in tort.

Southwick vs. First National Bank of Memphis, 84 N. Y., 420.

VI. The distinction between actions of debt or assumpsit for money had and received and trover is material and important. In bringing an action for money had and received instead of trover the plaintiff

waives any complaint with a view to damages for the tortious act by which the checks were converted into money and takes the *net proceeds*, subject to all consequences of considering the demand in question as a debt, and, among others, to that of the defendants having a right of set-off if they have any.

Hunter vs. Prinsep, 10 East, 378, 391

VII. An action for money had and received is an equitable action, and is open to equitable defenses. It is based on the theory that the moneys in question "*ex æquo et bono*" belong to and should be returned to the plaintiff. It is governed by less stringent rules than those which govern other actions, even those which arise on contract, express or implied. In it the defendant may interpose as a defense any matters tending to show that the moneys claimed to have been received by the defendant were not the moneys of plaintiff, or were not had and received to and for the use of the plaintiff, or that the plaintiff has suffered no loss by reason of the defendant's acts.

Chapman vs. Forbes, 123 N. Y., 532 (op. 535-7).
Kingston Bank vs. Eltinge, 66 N. Y., 625.
Roberts vs. Ely, 113 N. Y., 128.

VIII. These distinctions are important in this case, because it is clear upon the evidence that whatever losses the Albion Bank may have sustained through its cashier Warner, it did not lose as much as a dollar through the proceedings of the defendants referred to in the complaint, or though their transactions with Warner.

Myers v. Mutual Life Ins. Co., 99 N. Y., 1.

Second Point.

Aside from the question of law involved in the case as to whether the checks in suit were obligations of the Albion Bank or were absolutely void in the hands of the plaintiffs in error, (which question will be hereafter considered), the evidence clearly established that the defendants were not guilty of any actual or intentional wrong, but that in receiving the checks from Warner they acted honestly and in good faith, and without any wrongful or improper intent, and in the usual and ordinary course of business.

I. The Court substantially conceded this in the opinion (marg. p. 186) and at the trial (marg. p. 175). But in addition to what was said by the Court there are other facts to which attention is asked.

II. The Court in its opinion very properly alluded to the undisputed fact that the defendants believed and were justified in believing that other persons were interested with Warner in the account when it was originally opened with Chase & Atkins and with themselves (statement of facts, *ante*, pp. 10–12; Washburn's test., marg. p. 120; Atkins' test., marg. p. 165; Chase's test., marg. p. 166; Whitney's test., marg. p. 157).

III. Prior to the formation of defendants' firm, Chase & Atkins (the old firm) had received, between March 2, 1880, and May 13, 1880, from Warner five checks like those in suit, amounting to $29,700, all of which were drawn upon and paid by the Third National Bank, the regular and authorized agent and depository of the Albion Bank, in the ordinary course of business and without any objection of question. The receipt of these checks and their payment by the Third National without objection or question was known to Washburn

and Whitney, who were at the time clerks of Chase & Atkins (test. above cited), and in taking the account of with Warner they were influenced thereby.

In view of the exceptions to the charge of the Court reference is made on this point to the charge of SHIPMAN, J., on the trial of an action brought by the same Receiver against Chase & Atkins to recover the amount of those checks and which was tried after the judgment in this case, and on which trial the defendants had a verdict, based upon the principles which the plaintiffs in error insist ought to have been applied by the Court on the trial of this case.

IV. The thirteen checks on which recovery was had were all in like manner drawn upon the Third National Bank, *which was the regular correspondent of the Albion Bank*, and were received by them at various times between May 10, 1881, and August 26, 1881, a period of over fifteen months, and were all paid when presented in the orderly and usual course of business. No question was raised in regard to any one of said checks during the period covered by the receipt of them, and the defendants were thus led to believe that the previous checks and each subsequent check as it was from time to time received had been properly obtained by Warner and those interested with him in his account (see opinion, marg., pp. 191-2). The *first notice* defendants had that the checks were questioned was the commencement of this suit January, 1885, *four years and five months after*.

V. The fact also alluded to by the Court in its opinion that defendants in their dealings with Warner paid out large sums to and for him and to the credit of the Albion Bank, and also deposited large sums to the credit of that bank with the Third National, shows that they were not acting dishonestly or in bad

faith, especially when their entire compensation for all their business done for Warner was $7,000 (Opinion, marg., p. 186).

VI. The checks referred to in the complaint drawn by the Albion Bank, at Albion, on the Third National Bank, at New York, in favor of the defendants, may be regarded as in the nature of domestic bills of exchange, and in that event the fact that they are drawn to the order of the defendants and not to the order of Warner, and were received by the defendants from Warner is not a suspicious circumstance, nor in any way unusual. Where the purchaser of a bill of exchange desires to remit it to a particular party for the benefit of the purchaser it is usual to make it payable to such party, and in such case the remitter does not act as the agent of the drawer, but acts for himself, and as between the payee and the drawer want of consideration cannot be shown if the payee is a *bona fide* holder for value. The fact that he acted for the bank in selling the exchange to himself does not on the established cases charge the defendants with notice that the exchange was issued without consideration.

Armstrong vs. American Exchange Bank, 133 U. S., 433, 453.

VII. Furthermore, the instruments in suit are drafts or checks drawn by the cashier, who was the regular authorized agent of the Albion Bank for drawing such drafts or checks. Such checks or drafts are known as cashier's checks or drafts, and where the Bank is in good standing are regarded as cash (Apgar, test., Record, marg. p. 150; Moore, p. 152; Ralston, p. 153; Kissam, p. 154). The defendants received the checks for value. There is nothing on the face of the checks to lead the defendants to suspect, nor did they in fact

suspect, that the Albion Bank received no consideration from Warner, as purchaser of the drafts.

On this point the learned Judge before whom this case was tried was of the opinion, and so consistently ruled throughout the trial, that the checks on their face gave such notice.

In the case of *Anderson, Receiver, against Chase & Atkins*, before referred to, the learned Judge (SHIPMAN) before whom that cause was tried was of the opinion, and so ruled and charged the jury, that the defendants were not chargeable with such notice. He said: "A cashier's draft in the ordinary form for his personal debt did not disclose upon its face that it was an unauthorized use of the bank funds."

When it is established that the holder received such paper for valuable consideration without actual knowledge of want of consideration (which is the only test of authority), the only remaining question is whether the paper was received in the usual course of business? But defendants were not permitted to show that it was so received. If it was, there would seem to be no ground for charging the defendants with knowledge.

Third Point.

The Court erred in its refusal to allow the defendants the credits claimed by reason of checks and moneys deposited in the Third National Bank and used by it and disregarded well settled principles of law applicable to all cases involving the recovery of money:

I. It is a well-settled principle that in all actions (except those in which from the character of the injury and the circumstances under which it was committed,

punitive damages may be awarded), the recovery is limited to the amount of actual loss and that the damages recovered must be those necessarily resulting from the acts of the defendant sought to be charged and not too remote.

West. Union Tel. Co. vs. Hall, 124 U. S., 454.

In *Dow vs. Humbert, 91 U. S., 298*, MILLER, J., says: "If it were an action of trespass there is much authority for saying that the plaintiff would be limited to *actual and compensatory damages* unless the act were accompanied with malice and other aggravating circumstances."

II. The general principle above stated is illustrated by the following cases, in some of which the action sounds in tort.

Blot vs. Boiceau, 3 N. Y., 78:

This was an action against a factor to recover damages for a failure to sell at a specified price and for wrongfully selling at a less price. The Court held that the defendants could show in reduction of damages that the goods when sold were not worth more than the price at which they were sold, and approved the rule laid down in Story on Agency, §§ 217 and 236: "It is a good defense that the misconduct of the agent has been followed by no loss or damage to the principal, for then the rule applies that although it is a wrong, yet it is without any damage, and to maintain an action both must concur, for *damnum absque injuria* and *injuria absque damno* are in general equally objections to any recovery," and that defendant might show that the plaintiff had sustained no loss or reduce damages to the amount of the loss actually sustained.

Allen vs. Suydam, 20 Wend., 321 :

An agent receiving a bill or note for collection is chargeable with negligence if he omits to discharge his duty in respect thereto ; and the measure of damages is the actual damage sustained by the plaintiff ; and the defendant may show any circumstances tending to prove that the plaintiff sustained no actual damage, or tending to mitigate damages and reduce recovery to a nominal amount; and in the opinion, page 335, the Court cites cases to prove the following propositions, which are there laid down :

a. An agent or factor who neglects to insure for his principal according to orders may put himself in the place of the underwriter, and prove fraud, deviation, or any other defense which would have been good, had the insurance been made, or which would go to show that nothing at all or how much was actually lost by the neglect.

b. In actions against sheriffs, where they are sought to be made chargeable for the debt of another by their own negligence or misconduct, the defendant may prove the insolvency of the debtor or any other fact tending to show that the plaintiff has not been actually injured, or that the amount of the damage actually sustained is less than the amount of his debt.

1st Nat. Bk. vs. 4th Nat. Bk., 77 N. Y., 326 :

An action against bankers to recover damages for omitting to present the note for payment and to charge the endorser. The Court held that the defendants could prove in bar of the action that the endorser was insolvent and could prove in mitigation of damages that the endorser was worth property sufficient to enable the amount to be realized by process or judgment.

Ingals vs. Lord, 1 Cow., 240.

In trover for a note illegally taken and withheld the measure of damages is *prima facie* the amount of the

note; but the defendant may, for the purpose of reducing damages, show that the note was paid to the plaintiff or that the maker was insolvent, or any other facts tending to invalidate the note.

Potter vs. Lansing, 1 Johns. R., 215.

In an action against a sheriff for escape and for false return, plaintiff can recover no more than he has actually lost in consequence of the escape, and the defendant may show the insolvency of the defendant in the process in reduction of damages.

Russell vs. Turner, 7 Johns. R., 188.

In an action on the case against a sheriff for an escape the plaintiff cannot recover any more than he lost by the escape, and may show in mitigation of damages the insolvency of the debtor or the payment of the debt by him.

Hallett vs. Novion, 14 Johns., 279, was decided on the principle that where the owner gets back his property the recovery is limited to the expenses of procuring its return where the property has not been injured or diminished in value.

Saam vs. Saam, 4 Watts (Pa., 432):

An executor *de son tort* or an administrator *de son tort* may show in mitigation of damages that he has applied the proceeds of the property with which he became chargeable in payment of the debts of the deceased.

Pierce vs. Benjamin, 14 Pick, 356:

Trover for goods wrongfully taken from plaintiff by defendant, the collector of taxes, for non-payment of taxes. The Court held that the defendant might show in mitigation of damages that the goods were sold by him, and that the proceeds were applied in payment of the taxes, and that the measure of damages was the

value of the goods, deducting the amount so applied, and in its opinion, after stating that the general rule in actions of trover was that the value of the property taken was the measure of damages, used the following language: "Whenever the property is returned and received by the plaintiff, the rule does not apply; and when the property itself has been sold and the proceeds applied to the payment of the plaintiff's debt or otherwise to his use, the reason for the rule ceases and justice forbids its application. In all such cases the facts may be shown in mitigation of damages. These principles are supported by many adjudications and are founded in equity and practical convenience." Citing various cases. The same point is decided in *Baldwin vs. Porter, 12 Conn., 473*, and *Curtis vs. Ward, 20 Conn., 204.*

The principle is illustrated further by *Giles vs. Morrison, 50 Barb., 51*, and *Charles vs. Altin, 15 C. B., 46-63.* The first case was an action to recover damages arising from the failure of the defendant to deliver to plaintiff according to contract stoves, &c., to be sold by the latter and accounted for at a stated price; and the Court held that in mitigation of damages the defendants might prove the items and amount of expenses which the plaintiff would have been compelled to incur in introducing the stoves into the market, the cost of transportation, traveling expenses incurred in the disposition of the property and the storage or hiring of a place for its sale for the purpose of reducing the amount of damages so as to show that after deducting such expenses no profits would have been realized by the plaintiff.

In the second case, which was an action against a broker and insurance agent for refusing to insure, the Court held that he was entitled to show in mitigation of damages the amount of the premium which would have been paid for the policy had the insurance been effected.

Fourth Point.

The refusal of the Court to allow defendants to be credited with the checks amounting to the sum of $89,138.06, which were deposited by them in the Third National Bank to the credit of the Albion Bank, and were used by the Third National Bank in the payment of the checks in suit was erroneous under the facts of this case.

I. It was proved in this case beyond all question and was not, in fact, disputed that the moneys so deposited by defendants and by Warner had been used in the payment of the checks in suit. The conceded fact that the account on the books of the Third National contained credits to the Albion Bank of $281,169.65, and debits to the Albion Bank of checks in suit and other checks to the amount of $267,782.53 none of which debits or credits appear in the account on the Albion books, and that the difference between the accounts on the books of the respective banks at the close of the account on August 22, 1884, covering a period of 20 years amounted to about $10,000 (marg. pp. 126-7, 129-132-3 ; Opinion marg. p. 183), shows that the checks in suit could not have been and were not, in fact, paid out of the moneys of the Albion Bank, and consequently must have been paid out of the $281,169.65 so deposited as aforesaid, by defendants or third parties, by Warner's direction or by Warner.

II. At all events, the evidence tended to prove such fact, and defendants' counsel requested the Court to charge that, in case the jury found for the plaintiff, he could not recover any of the checks in suit which had been paid out of moneys so deposited by Warner or by defendants by his direction. The Court refused so to charge (marg. p. 169) and defendants excepted.

III. The Court, at marg. p. 143, (and before plaintiff had rested his case) ruled "that the defendants were not entitled to the benefit of any moneys deposited by them by Warner's direction (or by any other parties by Warner's direction) in the Third National Bank to the credit of the Albion Bank or to the benefit of any payments made by the defendants (or by other parties) by direction of Warner to the Third National Bank or to Warner for account of the Albion Bank."

This was an absolute ruling that the defendants were not entitled to the benefit of any such moneys, although they were the moneys of the defendants and had been actually used by the Third National Bank in the payment of the checks in suit. The ruling was not qualified by any condition or limitation whatever. At the time of this ruling plaintiff had not rested, and no claim or pretense had been made by him that such moneys were not in fact the defendants' own moneys or that they had been in any manner derived from the funds or assets of the Albion Bank, and the ownership of said moneys so deposited was not involved in the ruling. On the contrary, at the time of such ruling, it was assumed that the moneys so deposited and paid by defendants (marg. pp. 106-7) were the proper moneys of defendants, and all the evidence in the case up to that point as to the ownership of the moneys deposited by Warner tended to prove that they were his individual property and had not been derived from the funds, moneys or assets of the Albion Bank (see Coan, Test., Record, marg. p. 108, as to the items of $14,000, $20,000, $27,307.60 mentioned at marg. pp. 104–5, and referred to in the statement of facts *ante* pp. 12–16). This ruling precluded the evidence which the defendants had commenced to introduce and intended to introduce to prove that none of the moneys, whether paid or deposited by Warner or by defendants by his directions, were the moneys, funds or assets of the Albion

Bank or the proceeds thereof, but that such moneys were individual moneys of Warner and defendants respectively. This fact was assumed at the trial and must be assumed in discussing the correctness of the rulings and charge of the Court.

IV. Defendants requested the Court to charge the jury on this subject in various forms, viz.:

1. That defendants were entitled to be credited with *all* the moneys deposited by them in the Third National Bank to the credit of the Albion Bank.

2. That defendants were entitled to be credited with all of such moneys so deposited as *were entered on the books* of the Albion Bank.

3. That they were entitled to be credited with all of such moneys as were *not entered* on the Albion books.

4. That in case they found a verdict for plaintiff, the recovery could not exceed the difference between the accounts between the two banks as contained in their respective books.

5. That in case they found a verdict for plaintiff, he could not recover any of the checks in suit which had been paid out of moneys deposited in the Third National Bank to the credit of the Albion by defendants by Warner's direction.

All of these requests were refused and exceptions taken to such refusal (Record, marg. pp. 167-8-9).

V. Under the allegations in the complaint that the checks in suit were paid out of the moneys, funds and assets of the Albion Bank in its account with the Third National Bank, it was incumbent on plaintiff to prove that fact, and he could recover only to the extent to which such checks were paid out of such assets, moneys and funds, and on the facts proved, or which the evidence tended to establish, the rulings and charge and refusals to charge were erroneous.

VI. All of the checks given by defendants were payable to the order of the Third National Bank to the credit of the Albion Bank, and were deposited in the Third National Bank to the credit of the Albion Bank, so that the latter got the benefit of such checks. The amounts collected thereon were applied to the use and benefit of the Albion Bank by its agent and depository, just as effectual as if Warner had paid the money into the Albion Bank as he drew the checks in suit; and the defendants are entitled to insist that such moneys should be applied to the payment of the checks in suit.

Roberts vs. Ely, 113 N. Y., 128, 131.
Parsons on Contracts, 6th Ed., Vol. 1, p. 50.
Morawetz on Corporations, 2d Ed., Vol. 2, §§ 632, 716.
Merchants' Bank vs. State Bank, 10 Wall., 604, 726.
Bolton vs. Hillenden, 1 Ld. Raymond, 223.

The fact that a corporation has had the benefit of a contract precludes it from setting up *ultra vires* or want of authority on the part of the agent.

Morawetz on Corporations, *supra*.

VII. We submit, with great respect, that the reasoning of the Court below in its opinion on this question on the motion for new trial (marg. pp. 195 to 200), and which controlled the Court in its rulings at the trial is illogical and unsound.

1. The Court conceded the contention of defendants' counsel by this statement in the opinion: "If the evidence established that the checks were not paid by the New York Bank out of the moneys of the Third National Bank, but were paid out of the moneys provided for that purpose by Warner, the jury should have been instructed that their verdict could be only for nominal damages." This is our contention, and the requests to charge

(at marg., pp. 167, 168) presented this point in several aspects.

2. Why the Court did not charge in accordance with the foregoing statement in the opinion is shown by what follows: "but the payment of the checks by the New York Bank was, none the less, a payment by the Albion Bank, or a payment out of its funds, because the latter was put in funds without the knowledge of its officers, and its correspondent paid the checks without their knowledge." This shows that in the view of the learned Court the material inquiry was not so much whether the bank had been put in funds to pay these checks, but whether its officers know that fact.

When the Court held, as it did, that the mere fact that the moneys were deposited by defendants to the credit of the Albion Bank, no matter from what source derived, made those moneys funds of the Bank of Albion, and thus gave that bank the benefit of our moneys, that bank, on every principle, was bound to allow us for those moneys in some way, as will be hereafter shown. Instead of so doing, the Court erroneously held that it is not open to the defendants to show that those moneys were not in fact the moneys of the Albion Bank, and that no inquiry can be made into the source whence those funds so deposited came; thus: "If Warner had made deposits *in his own name* with the New York Bank, and that bank, pursuant to his instructions, had charged the checks when paid against his account, the defendants might well insist that the checks were not paid by the Albion Bank or out of its funds. Under such circumstances the plaintiff would certainly be required to prove that the deposits made by Warner were funds of the Albion Bank, but when Warner caused deposits to be made with the New York Bank *in the name of the Albion Bank*, the title to the fund created by the deposits vested in the latter as against Warner."

To make this clear, the Court adds: "When the New

York Bank credited the Albion Bank with these deposits it assumed the relation of debtor, not to Warner, but to the Albion Bank, for the amount, and when it paid checks drawn against the fund and charged them to the Albion Bank, it paid them out of the funds of the Albion Bank, as between itself and the Albion Bank and as between the latter and Warner."

3. In these statements the Court clearly erred. It is quite true that when the moneys were deposited to the credit of the Albion Bank with the Third National Bank it assumed the relation of debtor to the Albion Bank, and that thereby such moneys became the moneys of the Albion Bank, *as between that bank and the Third National Bank*, and warranted the latter in paying the checks in suit out of such deposits; but as between Warner and the Albion Bank or as between the Albion Bank and the defendants the account between the two banks was not conclusive, and the fact that the deposits were so made did not, in a controversy between the Albion Bank and the defendants, preclude the latter from claiming that the moneys were their own or Warner's moneys and had been deposited to meet these checks, and that the Albion Bank had *received and applied these moneys to its own use*, and that the checks in suit had not been paid out of the moneys, funds and assets of the Albion Bank, and that the defendants had not received moneys, funds and assets of the Albion Bank.

VIII. The only limitation upon the authority of Warner to draw and use these checks, even for his personal purposes, was that he should pay the money for them, just as any other dealer with the bank who wished to purchase a draft in the ordinary course of business. If Warner paid into the bank the amount of these checks as he drew them, or if he borrowed from the bank the money represented by them, or had the bank given him credit for the amount, or had he given the bank security for

the same, as any other customer might have done, no one would have been subject to any claim of the bank to recover the amounts of the checks or damages for their conversion. The defendants would be entitled to the same protection as Warner had the moneys represented by these checks been paid by them to the bank at any time; *à fortiori* if they furnished the moneys to the drawee of the checks with which to pay them, and they were paid out of such moneys, they are free from liability.

IX. It is needless to consider or discuss what is said in the opinion "as to the possible right of third parties whose moneys were misappropriated by Warner and deposited with the New York Bank to the credit of the Albion Bank to reclaim the amount from the Albion Bank;" or what is also said in the opinion to the effect "that the defendants have no interest in the question whether the Albion Bank paid the checks out of the moneys for which it is accountable to third persons, or even out of the money for which it may be accountable to Warner," because there are no such questions in the case, and no evidence had been furnished which could give rise to any such questions; but these immaterial speculations diverted the mind of the Court from the real questions in the case.

X. Although the checks in suit and all the other checks, included in the $267,782.53 before mentioned, when paid were, in the first instance, charged to the Albion Bank, the latter sustained no injury by such charge, if it was discharged without using the moneys, funds and assets of the Albion Bank for that purpose.

Had any of said checks been paid under such circumstances as rendered their charge by the New York Bank to the Albion Bank improper, and the charge had been cancelled, or the money charged had been refunded to the New York Bank and the charge had been

discharged by a credit of the same amount, the Albion Bank would have suffered no loss.

Had the checks in suit been paid under such circumstances as would have entitled the New York Bank to recover the moneys from Warner or the defendants, and they had repaid such moneys to the New York Bank, the Albion Bank would have suffered no loss.

Why, therefore, when the Albion Bank seeks to recover from the defendants the moneys received by them on the checks in suit should not the defendants be permitted to show that the checks had been paid, not out of the moneys of the Albion Bank, but out of moneys deposited by them or other parties for the purpose, or had been refunded to the New York Bank, so that the Albion Bank had suffered no loss?

Why, in short, is it not a defense to this action that the Albion Bank has not sustained the loss of one dollar through Warner's transactions with the defendants, because for every dollar that he drew out he paid another dollar in?

XI. Upon the refusal of the Court to give the defendants the benefit of the moneys in question on the ground that there was no evidence that the Albion Bank had any knowledge of the deposits made by Warner or defendants, or had assented thereto or had accepted the same, it is sufficient to say—

(a) The question of acceptance or assent is outside of the case at bar, and is wholly immaterial because it is proved that the checks deposited by defendants were actually applied to the use and benefit of the Albion Bank by the Third National Bank, the agent and depository of the Albion Bank.

Barnes vs. Ontario Bank, 19 N. Y., 152.

(b) If acceptance or assent be necessary, the deposits and payments in and to the Third National Bank to the credit of the Albion Bank, being beneficial to the latter, the legal presumption is that they were

accepted, and if not, the onus is on that bank to rebut the presumption

London Banking Co. vs. London Bank, 21 Q. B. Div., 535.

(c) Warner's knowledge of the deposits was the knowledge of the Bank, and is equivalent to an adoption and ratification of them by the Bank.

Holden vs. N. Y. and Erie Bank, 72 N. Y., 286.
Bank of U. S. vs. Davis, 2 Hill, 451.
Myers vs. Mutual Life Ins. Co., 99 N. Y., 1.
Scott vs. Middletown R. R. Co., 86 N. Y., 200.

(d) Warner's knowledge was the Bank's knowledge, not only in law but also in fact.

He ran the Bank—was the "factotum" (1 Hill, 505). He also, as executor, owned nearly all the stock.

(e) The Albion Bank was bound to know the state of its accounts with the Third National, and to know of these deposits.

Bank of England vs. Vagliano, L. R. (1891) App. Cas., 107.

(f) The Albion Bank never objected to the accounts rendered by the New York Bank, in which defendants' checks are credited, to the Albion Bank, but, on the contrary, that bank, as well as the Receiver, accepted and adopted the accounts rendered by the New York Bank (marg. p. 127).

(g) The Court below disposed of the question when it held that the moneys deposited by defendants or Warner to the credit of the Albion Bank became the moneys of the Albion Bank, whether it had knowledge of such deposit at the time or not. And when the moneys so deposited were applied to the payment of the checks in suit and other obligations of the Albion Bank the legal effect is the same as if that bank had

itself received this money and applied it to such payment.

XIII. The Court below felt, as every one must feel, that the defendants' claim to credit for the moneys in question was based on natural justice and equity, and that there ought to be some mode in which it could be enforced; but the Court, while recognizing such claims, declined to enforce it for reasons stated in its opinion (marg. p. 199) near the close of the discussion of this subject, when it is said: "It was open to the defendants to show upon the trial that the Albion Bank did not *eventually* sustain any loss by Warner's misappropriations of its checks or moneys and thus reduce plaintiff's claim to nominal damages."

It should first, however, be said that the statement in the opinion as to the "presumption that the moneys deposited were those of the Albion Bank, and that there was no proof to the contrary," is not correct nor based on or justified by anything which occurred at the trial, because that question was never raised at the trial, but was shut out by the rulings of the Court made before the plaintiff rested his case and at the suggestion of plaintiff's counsel. By the remark first above quoted the Court meant and said that it was incumbent on the defendants to show "that the Albion Bank did not *eventually* sustain loss by means of *any* of the misappropriations alleged to have been made by Warner," because in the opinion it is stated a little further on that "it was for the defendants to prove that, notwithstanding their wrongful participation with Warner in misappropriating the funds of the bank, the bank did not suffer loss," and then it adds that even "if they had shown that *all* his misappropriations had been made good by the return of what he has misapplied, it is not entirely clear that they would have been liable only for nominal damages," and in support of this cites authorities which the Court seems to think support its

theory that the defendants are not entitled to any credit for these moneys unless it be shown that the bank accepted them; and further on says: "Here all the money returned by Warner was insufficient to replace his defalcations by an amount larger than the sum sought to be recovered of the defendants, and the bank had no knowledge that he had returned anything to replace what he had appropriated until he had again misappropriated it."

The Court thus held that the defendants were not entitled to show that the checks in suit were paid out of the moneys deposited by them or by Warner, because there had been *previous or subsequent misappropriations* by Warner outside of the account in the Third National Bank in transactions with which defendants were innowise connected, and it had not been shown that the entire defalcation had been made good.

The result of this reasoning is that although the checks in suit were not paid out of any moneys, funds or assets of the Albion Bank, and, although they were, in fact, paid out of moneys deposited by defendants, and that, therefore, the defendants did not receive any moneys, funds or assets of that bank, still they must refund the amount received by them on the checks in suit, because Warner, during a series of years, before and after his transactions with defendants, had robbed the bank, and the amount of his entire defalcations exceeds the amount claimed from the defendants.

It is actually now the law of this case that although the Albion Bank lost nothing through Warner's transactions with the defendants, yet the defendants must contribute to pay what the bank may have lost through his transactions with other people.

We submit with respect that there is no justice or logic in such reasoning, and that the Court below ignored well-established principles of law applicable to all actions for the recovery of money.

XIV. It follows that the Court also erred in refusing to give the defendants the benefit of the moneys which had been deposited by Warner in the Third National Bank to the credit of the Albion Bank, and which had been used in the payment of the check in suit.

Fifth Point.

The Court committed serious error in its charge to the jury, whereby the defendants were prejudiced.

I. The case was presented to the jury by the Court upon a fallacious basis and theory as to the question of special authority (Record, marg., pp. 172, 173, 178).

1. The Court, at p. 172, and again at p. 178, instructed the jury that defendants were chargeable with notice that Warner's *appropriation of the bank's moneys to his own use* was unauthorized, unless the officers or directors had given him *special authority* to do so—that is, *special authority* to *appropriate the moneys of the bank* to his own use (marg., p. 172–3). Again, at marg., p. 174, the Court in its instructions stated that defendants may have thought that by the special confidence of the officers Warner was permitted to indulge in this extraordinary course of business; and this extraordinary course, the Court had just stated, was *transferring the funds of the bank to his own use* (marg., p. 174).

2. Again, at marg., p. 175, the Court in its instructions stated that "the defendants were liable if when they received this money (if it was the money of the bank appropriated by Warner without the consent of the directors) the defendants believed that he

had taken it without the consent of the directors to use for his speculation;" and immediately thereafter the Court stated "that the circumstance that defendants did pay these large sums of money by his direction into the bank is entitled to consideration as bearing on the question of their belief"—that is, their belief that he was appropriating the bank's moneys to his own use with the consent of the directors.

No such claims were made by the defendants, and no such theory was advanced by them or for them, and there is nothing in the case to warrant the submission of the case to the jury on any such false theories.

II. It was idle for the Court to charge in connection with the above propositions, at marg., pp. 171, 173, 174, that "If defendants really believed that Warner had obtained such special authority to appropriate the moneys of the bank to his own use, not by collusion, but *by an honest arrangement* with the directors and officers of the Albion Bank, they might be protected," —as if there could be an honest arrangement by which the cashier could have been permitted to appropriate moneys of the bank to his own use; and such an arrangement must have been collusive, and as to this the Court also charged (marg., p. 171-173-178) that if this were done by collusion between Warner and the directors the defendants would not be protected.

It is submitted that the defendants' case was prejudiced by laying down such theories as their grounds of defense, when they relied on totally different grounds.

III. If by the charge at marg. p. 171, the Court intended to lay down the principle that if the directors authorized Warner to loan the moneys of the bank to himself the defendants would be protected if the directors acted honestly though indiscreetly, the Court erred in that portion of the charge in which it is said that the defendants would not be protected if the

directors acted collusively, because if the authority was actually given by the directors to Warner to loan moneys to himself the defendants would be protected so long as they were not cognizant of the collusion and took the checks without notice of it and in the belief that he had been so authorized.

IV. The Court erred in charging the jury that the more serious question for the jury was whether defendants believed that Warner was using the money of the bank for his speculative purposes, without authority (marg. p. 172). As the charge stood it tended to prejudice the defendant, because the jury was not charged that it would make any difference if they did not so believe, and that part of the charge was nullified by other portions of the charge which preceded and followed.

V. The fact that the jury were misled by the charge of the Court is shown by their efforts to obtain correct instructions by means of the two questions which they asked the Court after they had retired to consider their verdict.

But the Court further erred in the answer given by it to the first question (at marg., p. 177). "*Question.* Has the cashier of a bank the legal right to draw a check as cashier of the bank and use it for personal purposes, *provided he deposits funds to meet it,* or is properly authorized by the officers of the bank to draw said check?" The Court did not answer the question as to the deposit of funds, but said that the cashier had no right to draw a check as cashier and use it for personal purposes, although he *intends* to deposit funds to meet it, and then the Court adds: "He has a right to do so (that is, to use for his own personal purposes) with the consent of the directors or managing officers of the bank." Here, again, is the theory of special authority to mis-

appropriate funds of the bank. The Court did not answer the question as to proper authority, and it seems quite clear that the answer of the Court to both questions tended to mislead the jury.

VI. The jury then made another effort (marg., p. 178) to obtain instructions as to "proper authority," and asked this question: Q. "In the absence of proof, as to whether a cashier has or has not the right by proper authority to give a cashier's check for his personal account, does the burden of proof rest with the defendants, or do they get the benefit of the doubt?"

The defendants were entitled to a charge that in such a case they should get the benefit of the doubt.

Farmers' and Mechanics' Bank vs. Butchers' and Drovers' Bank, 16 N. Y., 125.

The Court, instead of answering the question, made an answer which ignored the presumptions of law and the doctrines of acquiescence and estoppel which are about to be considered, and assumed that Warner was appropriating the banks' money to his own use, and again charged that this could not be done without special authority so to do, and then repeated the charge that if authority had been obtained honestly to allow him to loan the moneys to himself, and defendant so believed then they were not liable. As there was no pretense or claim of any such special authority this charge was virtually a charge to find for plaintiff, which the jury accordingly did.

VII. The Court should have charged as requested by the *fifth, sixth, seventh, eighth and ninth requests* (marg., pp. 170 and 171), and the exceptions thereto were well taken (marg., p. 176). These requests are as follows:

FIFTH. "That the authority of a cashier may be

by parol and inferred from the general manner in which for a period sufficiently long to establish a settled course of business he has been allowed, without interference, to conduct the affairs of the bank.

SIXTH. "That the authority of a cashier may be implied from the conduct or acquiescence of the corporation, as represented by the Board of Directors.

SEVENTH. "That when a cashier in numerous business transactions has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations.

EIGHTH. "That the directors of a bank cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them, and that it is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers.

NINTH. "That which such directors ought by proper diligence to have known as to the general course of business in the bank they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

These requests were in accordance with the decision of this Court in Martin vs. Webb, 110 U. S., p. 7, and presented the question of Warner's authority, as implied in the bank's course of dealing, to issue the checks in suit; and the question of estoppel of the bank to deny

the existence of the actual authority which that course of dealing implied.

1. The Court refused to charge as requested, doubtless for the reason that, in its judgment, actual authority specially conferred on Warner to misappropriate the bank's money, or to loan it to himself could alone avail the defendants as a defence to the action.

2. The Court, in its opinion, (marg., p. 192) seems to recognize the principles of Martin vs. Webb, 110 U. S., 7, and other cases, but avoids that case and the principles settled by it by the statement that "the defendants chose to rely upon appearances," and "that they could not be certain that the directors were not being deceived by Warner, and were not, in fact, ignorant that he had ever made any use (*of*) the checks in question," and the Court adds "that it was incumbent on the defendants to show that the directors *knew* and acquiesced in what Warner was doing," and then adds that the question of the ignorance of the directors was for the jury, and that they found that the directors were *ignorant* of Warner's acts.

(a) It may be asked where is the evidence of this; when and where was the question of the directors' ignorance submitted to the jury, and where is the evidence that the jury found that the directors were ignorant?

(b) This reasoning of the Court further shows that the Court erred in excluding the evidence offered by defendants, at marg. p. 104, to prove that the bank officers and directors had information in regard to the affairs of the bank when necessary to meet the requirements of the annual examination of the Bank Examiner.

(c) The reasoning of the Court is irrelevant, because the question arising on the facts of this case and presented by these requests was whether the defendants had a right to "rely upon appearances," not on the ground that the appearances actually represented the

facts, but on the ground that the bank was estopped to deny that they did.

Farmers' and Mechanics' Bank vs. Butchers' and Drovers' Bank, 16 N. Y., 125, 136.

(d) Express authority is not essential to the validity of any act of an officer of a corporation ; neither is express ratification. His unauthorized acts may be ratified and become binding on the corporation through informal acquiesence merely.

Hoyt vs. Thompson, 19 N. Y., 207.

3. These requests presented the principle that the Albion Bank was bound to know that the checks in suit had been issued by Warner from time to time, and had been paid by the Third National Bank. . The negligent omission to examine the accounts and vouchers sent by that bank was the cause of any loss sustained by the Albion Bank. That bank is charged with the knowledge of the facts, the existence of which it would have found had the requisite investigations been made. This is the law of this Court, as is shown by the extract from the opinion in Martin vs. Webb, at marg., p. 193 of the Record. This Court said : " That which they (directors) ought, by proper diligence, tohave known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by circumstances in dealing with the officers upon the basis of that course of business." This principle is not limited to the general course of business of a bank, but is extended to a particular course of transactions, especially when such transactions are numerous and extend over such a period of time as to have acquired the character of a course of business. If the directors had made proper examination, they would have ascertained the issue of the first of these checks, or if not of that, the issue of some of the other checks

issued within a short time thereafter. By not making the examination they permitted Warner to continue to issue similar checks for a period of nearly a year and thus led the defendants to believe that they were all right and proper. A clearer case of implied authority and of estoppel was never presented.

N. Y. & New Haven Co. vs. Schuyler, 34 N. Y., 53; Op. DAVIS, J., pp. 53, 54, 57–61.

Merchants' Bank vs. State Bank, 10 Wall., 604, 649–650.

Upon similar grounds of estoppel a depositor in a bank who seeks to recover the amount of a check charged against him, his signature to which was forged, cannot recover where he has failed to examine his pass-book and returned checks.

Leather Bank vs. Morgan, 117 U. S., 96.
Dana vs. Bank of Republic, 132 Mass., 156.

In like manner, the drawee of a check is bound to know the signature of the drawer, and having paid the check cannot recover the money if the signature were forged.

Cooke vs. U. S., 91 U. S., 389, 396.

VIII. The Court erred in refusing to charge in accordance with the *first, second and third requests* at marg., p. 169. These requests are as follows:

FIRST. The plaintiff cannot recover unless the jury find that he has proved that the defendants took the checks in suit with actual knowledge of Warner's fraud or in bad faith.

SECOND. That mere negligence on the part of the defendants in taking said checks would not make them liable.

THIRD. That even though the jury should find that the defendants did not exercise the care and

caution which prudent men would naturally exercise in taking the checks in suit; tha is not sufficient to render them liable.

1. These requests are supported by the authority of *Simonds vs. Goodman, 20 How., 343;* and they are based on the theory that the checks in suit were not in themselves void, but would be valid instruments if the moneys for the checks had actually been furnished by Warner, or if the Albion bank was estopped from denying that fact, or if by their negligence they had permitted Warner to issue numerous checks of the same character extending over a considerable period of time, and had done this to such an extent as to warrant the inference of implied authority, or created an estoppel against denying his authority, so that the defendants would be protected if they had taken the checks under the belief stated in the first request, in which event the principles of the second and third requests would be applicable.

2. The Court refused these requests because it regarded the checks as absolutely void and of no effect, in which event the principles of said requests were not applicable; and in support of this position the Court relied on the case of *Claflin vs. Farmers' and Citizens' Bank, 25 N. Y., 293* (Opinion, p. 188).

In that case there was no evidence of any course of conduct on the part of the bank, its officers or directors, from which an implication of authority in the president to certify his own checks could be deduced. Moreover, it was conceded that the president did not have on deposit to his credit the moneys represented by his check, and there was no evidence tending to support an estoppel (p. 301).

In the present case evidence was excluded by the Court which would have shown that it is in the usual course of business for a bank officer in the country to make payments in New York by means of checks of his

bank, drawn by him upon the bank's New York correspondent.

3. The Court could not have refused these requests without holding that the mere fact of an agent drawing a draft in the name of his principal to his own order or to the order of his own creditor is sufficient to charge the holder with notice of want of authority, where the paper was received in the usual course of business, and without knowledge of want of authority. The rule is well settled the other way.

Potts vs. Taylor, 140 Pa. St., 601.
Haldeman vs. Bank of Middletown, 28 Pa. St., 440.
Moorehead vs. Gilmore, 77 Pa. St., 118.

The test is whether "the transaction falls in with the current of trade;" if it does the holder is not put upon enquiry.

Tanner vs. Hall, 1 Barr, 417.

This was also the controlling test in the Claflin case (p. 298).

4. The case of West St. Louis Savings Bank vs. Shawnee Co. Banks, 95 U. S., 557, also cited by the Court, is not in point. That case merely decides that the note of a cashier endorsed for his accommodation in the name of his bank by his own hand, and discounted by another bank *with actual knowledge of the facts*, cannot be enforced against the accommodation endorser upon the theory that the endorsement was within the scope of the cashier's general powers.

Sixth Point.

The Court did not present the cause to the jury on the issues raised by the evidence nor on the theory

on which the cause was tried by the defendants, as to implied authority and estoppel, but on false issues calculated to mislead the jury and to prejudice the defendants.

I. It had been proved by Coan, the bookkeeper and teller of the Bank of Albion, that Warner had a private account in the Albion Bank from 1880 to 1883, the period covered by these transactions (marg, p. 99); and that when the bank closed this account was overdrawn $1,756.15 (marg., p. 125).

It was also proved by the plaintiff that there were in the bank at the time of its failure notes made by Warner to the amount of $15,922.49, which were made in 1880, 1881, 1882 and 1884, and other notes made by Stewart and Warner amounting to $10,000 (marg., p. 125).

It was also proved that in the usual course of business of the Albion Bank drafts on the New York Bank were drawn by the president, vice-president, cashier or teller, as the case might be, and that such drafts were drawn whenever requested *on receipt of the money thereby represented;* or, in other words, that the bank sold its exchange on New York to any one and every one; and that in the ordinary course of business the money for the bill was paid at the time; also that the drafts would be entered in the books, but if it were not entered the Albion Bank would have notice of it when the statements of account were sent by the New York bank and when the draft or bill was returned (marg. pages 101, 102).

It was also proved that when the account was opened by Warner with the defendants they were informed that other parties were interested with him in the account, but that it would be managed by him (marg. pp. 120, 157, 165, 166).

It was also proved that the statements of account and the vouchers for money paid by it were regularly sent by the New York bank to the Albion Bank, whereby the

latter bank had notice of all drafts drawn upon the New York bank, and that the *checks in suit* were included in such statements and returned by the New York Bank to the Albion Bank, and they were produced on the trial by the Receiver, who found the statements of account and the checks in the vault of the Albion Bank.

It was also proved that the first check received by defendants from Warner was May 11, 1880, and the last was received August 26, 1881, and that during that period thirteen checks were so received, and that all had been paid by the New York bank in the ordinary course of business without question or objection.

It was also proved that checks of cashiers of out of town banks on a bank in New York are usually and customarily received and treated as cash (marg. p. 162).

It was also proved that the bank was run by Warner, that all the powers of the Board and of the officers were practically exercesed by him, and that he as executor owned almost all the stock.

The defendants had also testified that the checks in suit were received by them in good faith, and in the belief that they had been properly obtained by Warner from the bank of which he was cashier (Kissam testimony, marg. p. 154; Whitney testimony, marg. p. 157; Washburn testimony, marg. p. 120).

II. On these facts defendants insisted *not* that Warner had received special authority to appropriate the moneys of the bank to his own use, or to loan the moneys of the bank to himself or to use the moneys of the bank for his own speculative purposes, *but* that neither the checks in suit nor the receipt of them by defendant was unusual nor out of the ordinary course of business, and that under the special circumstances of the case the defendants had a right to believe and did believe that everything which was necessary or proper to be done to authorize and entitle Warner to draw the checks or drafts and to make them regular and proper

had been done, and that the moneys for the checks or drafts had been actually furnished by Warner and his associates to the Albion Bank, and further that if anything requisite to make the draft regular and proper had been omitted, the bank was chargeable with such omission and was estopped by its own acts and negligence *from asserting the same against the defendants.*

Merchants Bank vs. State Bank, 10 Wall., 604, 646.
North River Bank vs. Aymar, 3 Hill, 262.
Exchange Bank vs. Monteath, 26 N. Y., 505.
Griswold vs. Haven, 25 N. Y., 595.
Farmers' and Mechanics' Bank vs. Butchers' and Drovers' Bank, 16 N. Y., 125.
Chemung Bank vs. Bredner, 44 N. Y., 680.

The principle of the foregoing cases and which sustains the validity of the checks in suit in the hands of the defendants is this: "Where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has or is presumed to have any knowledge with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent and which cannot be ascertained by a comparison of the power with the act done under it" (16 N. Y., 135; 25 N. Y., 601).

In this case Warner had authority to draw exchange on New York if the bank were paid the price of the draft; he was not disqualified to draw them for his own use on the same terms *(Wilson vs. El. Rg. Co., 120 N. Y., 145)*; the extrinsic fact was the payment of the price to the bank; the drawing of the draft was a representation of that fact and may well be deemed *prima facie* evidence that it fell within the scope of his duties as cashier.

Fleckner vs. Bk. of U. S., 8 Wheat., 326.
Angel Ames on Corp., 299.

III. It was in this connection that the defendants asked Court to instruct the jury in accordance with the 5th, 6th, 7th, 8th and 9th requests (marg. page 171) as to the duties of directors, and in accordance with the 1st, 2d, 3d and 4th requests (marg. p. 169) (see preceeding Fifth Point). The Court refused each and every of these requests and defendants excepted (marg. p. 175-6), and, while so refusing, the Court placed the case before the jury on the erroneous theory of "special authority to use and appropriate the moneys of the bank to his (Warner's) own use in his private peculations." The jury, however, understood and appreciated the theory of the defendants and showed their understanding of it by the question put by them to the Court at marg. p. 177), viz.: Has the cashier the legal right to draw a check as cashier and use it for personal purposes, *provided he deposits funds* to meet it, and by the question put at p. 178. The error of the Court in its answers to these questions has already been considered. It is sufficient at this time to say that the Court did not answer the first question, but in reply said that the cashier had no right to draw a check and use it for personal purposes, although he *intended to deposit funds* to meet it, thus ignoring the point of the question put by the jury.

Seventh Point.

The Court erred in its rulings and charge that the checks in suit on their face carried notice of their alleged defects and its charge to the jury as to the validity of those instruments.

I. It may be conceded that when an agent or a trustee draws a check as such, on a bank, it is notice to the party receiving it that it may have been drawn on funds

of the principal or of the trust, and it may be conceded that a presumption to that effect arises. It may also be conceded that when such agent or trustee endorses a note or check payable to his order as such, it is notice that the note or check was originally the property of the principal or of the trust. And so it may also be conceded that when a cashier draws a check on his own bank for his private use, such check is a notice that it is drawn on funds of his principal; but it does not follow from this that the check is in itself void or illegal.

II. Such a check is a valid and proper instrument and free from objection, although received and used by the payee in a transaction with the agent or cashier individually, provided the agent or cashier was entitled to the moneys for which the check is drawn, and to use them for his own personal purposes. An executor has a right to draw a check as executor in his own favor if he is personally entitled to the money, as for a debt due to him from the estate, or for his commissions, or for his proper disbursements. So also a cashier or other officer may draw a check or note in his own favor or for his own use if the money thereby represented was due to him, or if he had purchased the draft, or if in any way he was entitled to the moneys thereby represented.

Wilson vs. Metropolitan El. Ry. Co., 120 N. Y., 145.

A partnership may draw a check on the account of one of the partners if the partnership money is kept in that name.

Crocker vs. Colwell, 46 N. Y., 212.

If for the checks in suit Warner furnished the money they were not void nor irregular, nor unusual, and the Albion Bank could not have refused to pay them merely

because they were drawn payable to himself, and the transferee could have recovered on them.

III. In this case the drafts were not drawn on the Albion Bank, of which Warner was cashier, but upon a New York bank in which the Albion Bank kept an account. Such a draft is the usual and customary mode of transferring funds from one place to another, and was the usual mode of transferring funds from Albion to New York. If Warner had given the money for them to the Albion Bank before the drafts were drawn, or if the bank had loaned him the money, or he had secured their payment, or obtained credit for the amount, or had in any way arranged with the bank therefor, the drafts would be in all respects regular and valid. In fact, the cashier stands on the same footing as all other customers; if they pay for their drafts they can enforce them; so can he.

Conyngham's Appeal, 57 Penn. St. R., 474.

IV. It was proved at the trial that the money for one of the checks in suit, Exhibit No. 15, for $706.08 (marg., p. 12), had been paid to the Albion Bank by Warner and that the check was entered in the Albion books (marg., p. 99). On proof of that fact it was withdrawn by plaintiff's counsel by direction of the Court. The same fact might have existed in respect to any or all of the other checks in suit. It cannot be claimed that if Warner or those associated with him in the account had paid the Albion Bank the moneys for these checks, or had secured the payment to the satisfaction of the Albion Bank by a note discounted by that bank or otherwise, that the checks would be "nugatory," as the Court stated it, merely because Warner was the cashier of the Albion Bank. Nor can it be claimed that if the money had been furnished to the Albion Bank after the draft was drawn and before its payment by the drawee, or that the amount so paid had been refunded, that in such case

the Albion Bank could recover from the defendants the money received by them in payment of the draft, or that the Albion Bank could recover such moneys if the drafts were not paid at all, or if they had been paid out of moneys furnished for that purpose by Warner, or other parties by his direction.

V. If the fact that the checks in suit were drawn by Warner, as cashier, payable to the defendants, were received by them in a personal transaction with Warner, threw upon them the onus of proving that they received the checks in good faith for value, or that the checks were drawn under such circumstances as to render them valid and legal obligations against the Albion Bank. The defendants assumed such onus, but that is all, and the question is whether the evidence tended to prove either the existence of the facts or that the Albion Bank was estopped from denying their existence.

VI. The learned Court intended, on the motion for a new trial, to apply the rule in *Goodman vs. Simonds, 20 How., 343* (marg. p. 190): and that rule is applicable, and the burden of proof was on the plaintiff to show that the defendants received the checks with knowledge that the bank had not received the money which the checks represented *(Farmers' and Mechanics' Bank vs. Butchers' and Drovers' Bank, 16 N. Y., 136)*; but it is evident from the charge of the Court as it appears on the record, that the Court did not apply it at the trial, and its application was impossible, in the view that the Court took of the checks, as absolutely void and worthless unless special authority to Warner to use the bank's moneys for his own use was shown, entirely rejecting the other principle, that proof of the facts which raise an estoppel against the Bank is equivalent to proof of the fact which the Bank is estopped to deny. It was on that theory that the Court refused

to instruct the jury in accordance with the 1st, 2d and 3d requests (marg., p. 169) and, on the same theory, the Court might as well have instructed the jury to find for the plaintiff. It was not necessary for defendants to show that Warner had any special or general authority to appropriate the bank's money to his own use, nor any special or general authority to loan the moneys of the bank to himself. These were not the questions in issue. The question was whether the facts which the evidence tended to prove, and warranted the jury in finding, estopped the Albion Bank or its Receiver, by reason of negligence, acquiescence or adoption of the transaction, from denying that the checks were rightly and properly issued, or were issued under such circumstances as justified the defendant in believing that they had been rightfully and properly issued by the Albion Bank, provided the defendants had received them in the *honest belief that they had been so issued.*

VII. The Court itself, in its opinion on the motion for a new trial, lays down principles wholly different from and inconsistent with the theory of the charge, and at marg., p. 191-2, seems to recognize the force of the defendant's position, and concedes that the evidence raised a presumption of such knowledge and acquiescence on the part of the directors, but did not show it conclusively, and claimed that it presented a question for the consideration of the jury, and that the jury had found that the directors were *ignorant* of Warner's acts. Whether the directors were actually ignorant of Warner's acts was not submitted to the jury, but was taken from them by the charge. Furthermore, the question was not whether the directors were in fact ignorant of Warner's acts, but whether the bank was estopped from denying knowledge on the part of its officers and directors, in accordance with the 5th, 6th, 7th, 8th and 9th requests, marg., pp. 170 and 171, and

the principles of Martin vs. Webb, 110 U. S., 7, and of New York & New Haven R. Co. vs. Schuyler, 34 N. Y., Op. DAVIS, 53, 54, 57, 61. Had the Court given proper instructions to the jury on this point the verdict would have been for the defendants.

Eighth Point.

As to estoppel, acquiescence and the implied authority of Warner.

I. On the facts established by the evidence in regard to the omission of the Albion Bank, its directors and officers, to examine the books and accounts of the bank, and in leaving its entire management to Warner without exercising any supervision over him, the bank so far acquiesced in what he did as to estop it to deny that he had the authority which he was permitted to exercise, or that the checks had been rightfully and properly issued, or that it had received the moneys for the checks in suit or any other fact which, under the circumstances, was necessary to render their issue right and proper, and which was involved therein. If, through this acquiescence and negligence, the bank has sustained loss, the law does not throw it upon innocent third parties in the situation of the defendants.

New Haven R. R. Case, 34 N. Y., 30.

The facts on which this estoppel is based, are:

a. The conceded omission of the bank officers and directors to examine the accounts of the bank and particularly the statements of account rendered by the Third National Bank and the vouchers returned by it to the Albion Bank, and in omitting to compare the

account on the Albion books with the account rendered by the Third National Bank.

b. In failing to use the information and means of information which such officers and directors concededly had in regard to the affairs of the bank, as shown by the annual examination made by the bank examiner, and by the special examination made on the reorganization in 1883, and by the payment of dividends.

c. The presumption of actual knowledge arising from the uncontradicted evidence of West, one of the bookkeepers, as to the general knowledge in Albion that during the period of these transactions Warner was operating in stocks (marg., p. 162).

d. That (as was conceded) the management of the affairs of the bank was left entirely to Warner, and that he was frequently absent from Albion and was so absent about one-half of the time (West, Test., marg., p. 161).

e. That the checks received by defendants extended from May, 1880, to August, 1881, and that no question was raised in regard to them until January, 1885, when the action was commenced.

f. That a comparison of the books of the Albion Bank with the statements of account and vouchers rendered by the Third National Bank would have disclosed the fact that the checks in suit had been issued and had not been entered on the Albion books, and that large sums had been deposited in the Third National Bank to the credit of the Albion Bank, which did not appear on the books of the latter.

g. That each of the checks in suit was paid without objection by the Albion Bank, and that the issue and payment of such checks from time to time and their payment without objection was continued for a period of nearly a year, and that no question was raised in regard to any of said checks until after the failure and insolvency of the bank and of said Warner.

It is well settled in this Court:

(a.) That a banking or other corporation is liable to the same extent as a natural person for the negligent or wrongful acts of its officers, managers, agents or servants done in the course of its business and of their employment.

(b.) That a corporation or individual whose duty it is to make inquiry is presumed to know what such inquiry would have disclosed, and is chargeable with knowledge thereof.

(c.) So, also, if negligence of the officers or managers or servants of a corporation has occasioned loss to a third party to whom a duty was owing, the corporation will not only be liable for such loss, but will be estopped from asserting against a third party the existence or non-existence of facts which it was the duty of such corporation, its officers or servants to ascertain, and which would have been ascertained on such inquiry.

Cragie vs. Hadley, 99 N. Y., 135.
Fishkill Savings Inst. vs. Bank, 80 N. Y., 162.
Cutting vs. Marlor, 78 N. Y., 454.
New Haven R. R. Co. vs. Schuyler, 34 N. Y., 30.
Martin vs. Webb, 110 U. S., 7.
Prather vs. Kean, 29 Fed. Rep., 498, 502; 137 U. S., 604.
Briggs vs. Spalding, 141 U. S., 132.
Fulton Bank vs. Canal Co., 4 Paige, 127.

In *Cragie vs. Hadley, 99 N. Y., 135.* the Court held the corporation guilty of having fraudulently received a deposit, and say: "The acceptance of the deposit under these circumstances constituted a fraud. The presumption that the managing officers and agents of the bank had notice of its condition arises from the circumstances. They could not have been ignorant without imputing to them gross inattention to its affairs.

In *Fishkill Savings Inst. vs. Bank, 80 N. Y., 162,* the Court held a bank to be liable for the theft by its cashier of bonds received by him; and at page 169 DANFORTH, J.,

says: "There is evidence which permits an inference "that the board were informed of the use made of the "bonds on a previous occasion. This, however, need "not be relied upon, for it is apparent that the least "degree of that diligence and care to the exercise of "which the directors of the bank were bound by the "simplest obligation of duty would have disclosed to "them the large outstanding indebtedness of the bank "and the means adopted by the cashier to carry it "along. The defendant should be treated as if they "had made the inquiry and ascertained the fact— "citing *3 Coms., 156.* Indeed, a direct resolution of the "board would be no more convincing of their moral "participation in the wrong than the indifference and "heedlessness to their own duties through which alone "he was able to perpetrate the fraud. In such a case "the principal is bound not only as to the end but the "means also"—citing various cases.

In *Cutting vs. Marlow, 78 N. Y. 454.* CHURCH, Ch. J., says: "The exercise of ordinary care would have dis- "covered the wrongful practices of the cashier, because "they were not secret and were actually known to the "managing trustee, and if known the trustees had the "power, and it would have been their duty to effectu- "ally prevent it, and the presumption is that they "would have done so."

In *Prather vs. Kean, 29 Fed. Rep., 498,* affirmed in this Court, *sub. nom. Preston vs. Kean, 137 U. S. 604,* the Court held a bank liable for the theft of bonds by its cashier on the ground that they were guilty of gross negligence in not discharging the cashier after they were put upon inquiry in regard to his habits. The Court says "that the defendants knew that the "cashier had been engaged in business that was hazard- "ous and that his means were scant. He had free ac- "cess to valuable securities transferable by delivery, "easily abstracted and converted, and yet he was "allowed to retain his position without any effort

"to see that he had not converted the prop-
"erty of others or that his statements were
"correct. A prompt examination after his first
"admission that he had been speculating would have
"doubtless shown that even then some of the bonds
"had been exchanged for others, if, indeed, they had
"not been stolen. His position was one of trust and
"great importance. His own admission showed that
"he was not trustworthy for such employment, and it
"was gross negligence in the defendants not to dis-
"charge him or place him in some position of less re-
"sponsibility."

In *Martin vs. Webb, 110 U. S., 7*, with regard to the liability of a bank for an act of its cashier, the Court says: "Directors cannot in justice to those who deal
"with the banks shut their eyes to what is going on
"around them. It is their duty to use ordinary dili-
"gence in ascertaining the condition of its business
"and to exercise reasonable control and supervision of
"its officers. That which they ought by proper dili-
"gence to have known as to the general course of busi-
"ness in the bank they may be presumed to have
"known in any contest between the corporation and
"those who are justified by the circumstances in deal-
"ing with it upon the basis of that course of business."

In *Briggs vs. Spaulding, 141 U. S., 132*, this Court said (p. 165): "The turning point * * * is whether, under all the circumstances, they were guilty of negligence in producing any of the losses in question, not affirmatively, but because they did not prevent them, and this depends upon whether they should have made an examination of the books and assets of the bank, and whether, if they had, that would have enabled them to discover such a condition of affairs as would have resulted in placing the bank in liquidation, and whether thereby some of the losses would have been averted. Without reviewing the various decisions on the subject, we hold that directors must exercise

ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business as defined to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision."

The dissenting judges laid down the doctrine quite as emphatically (p. 169) : " Certainly Congress never contemplated that the duty of directors to manage and to administer the affairs of a bank should be in abeyance altogether during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank choose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents.

" As to the degree of diligence, and the extent of supervision to be exercised by directors, there can be no room for doubt under the authorities. It is such diligence and supervision as the situation and the nature of the business requires."

In *Fulton Bank vs. Canal Co., 4 Paige, 127*, money of the Canal Company was deposited by its president in the bank, and an account was opened in the name of the company. The president, without authority and without the knowledge of the directors, left his own signature as the name by which checks would be drawn. He drew out all the money within two days after it was deposited, and used it for his own purposes. The Court held that it was such negligence in the company to permit the funds to be so deposited as that the president could draw it out for his own purposes, that the loss must fall on the company and not on the bank.

That a corporation is estopped by the representations of its officers as to the existence or non-existence of a

material fact, and is liable for their negligence or wrongful acts, is fully established.

National Bank vs. Graham, 100 U. S., 699.
Armstrong vs. American Ex. Bank, 133 U. S., 433.
Manhattan Bank vs. Walker, 130 U. S., 277.
Merchants' Bank vs. State Bank, 10 Wall., 604, 645.

That a corporation is bound by the acts of those who control it and own all its stock when the question is one of acquiescence in a particular transaction, which otherwise might lack authority, is also established.

Genesee Bank vs. Patchin Bank, 13 N. Y., 309; 19 N. Y., 313.

Ninth Point.

The Court erred in the admission of evidence.

I. The questions put to Anderson, the plaintiff, at marginal, pages 110 and 125, as to the amount of Warner's indebtedness or defalcation were improper, and the exceptions were well taken. When the question was first put at page 110 the witness answered that he did not know, "but that it was considerable." Thereupon, at marginal, page 125, the same witness was asked and testified that he had made an investigation of the affairs of the bank, and was then asked: "From such investigation, what was the amount of the *defalcation*, if any, by Warner?" The defendants objected to the question and excepted. The witness answered "$350,000."

a. This evidence was immaterial, irrelevant and incompetent in any aspect of the case, and especially so

in view of the theory adopted by the Court in its charge to the jury, as well as in its rulings at the trial. The issues presented to the jury by the Court were whether Warner had special authority to loan moneys to himself, or to appropriate the moneys of the bank to his own use, or to draw checks in the name of the bank for his own use, as was stated in the charge (Marg., pp. 171, 173, 174, 177 and 178).

b. If the inquiry was material plaintiff should have offered the evidence of some one competent to testify. The witness had already said that he did not know, and it was improper to allow him to make a statement based on his investigation.

c. The correctness of his statement necessarily became an issue in the case, and the defendants were forced to go into this collateral matter without any previous notice or opportunity to make an examination.

d. The cross-examination of the witness (Marg., p.125) as to the mode of making his estimate shows that his statements were not based on knowledge and were in fact erroneous. This is proved by the fact that in his estimate of Warner's defalcation he included notes made by Stewart and Warner in 1880 to 1884, given to and held by the bank amounting to $25,022.49, and that he also included $35,000 of bonds, in respect to which there was no proof, and he also included all the checks (including those in suit) which were paid by the Third National Bank out of funds deposited by Warner or his direction, amounting to $253,273.18.

e. The inaccuracy of the witness' statement as to the amount of the defalcation did not benefit the defendants, and the evidence objected to had no other purpose or object than to prejudice the defendants.

II. The admission of the Sage check at marg., p. 159, was improper and tended to prejudice the defendants. This check was not material or relevant to any issue in the case. Nothing in the direct examination warranted its

introduction. The object and purpose of the evidence were to show that the defendants received a check payable to Warner as executor and entered it in his private account, and on it was based the question at marg., p. 160, as to what was the custom of the defendants in this respect. That question was improperly admitted, and defendants' objection was well taken. The introduction of this evidence required the defendants to explain the transaction and to show that the defendants derived no benefit from the Sage check, but that it was received by them merely for collection for Warner, and, when collected, the amount was paid to him (marg., p. 161). Such evidence necessarily prejudiced the defendants.

III. The evidence at marg., pp. 141 and 143, as to the receipt by the Albion Bank of the currency, cash or coin remitted to that bank by Kissam, Whitney & Co., was improperly received. The witness had no knowledge on the subject, as he testified, and the whole inquiry was irrelevant and immaterial to any issue in the case, and tended to prejudice the defendants.

IV. The questions put to Apgar (marg., p. 151), and to Moore (p. 153), and to Rolston (p. 153), were improperly excluded.

This evidence was not offered to show that any usage or custom in respect to receiving cashier's checks could "contravene well-settled legal principles," as stated by the Court in its opinion (marg., pp. 189, 190). The evidence was offered for the purpose of showing that there was nothing *unusual* or contrary to the course of business in the receipt of the check of the cashier of a bank in the individual transactions of such cashier, and not for the purpose of legalizing the transaction if it were in principle illegal. The grounds on which the

Court justified the exclusion of the evidence are stated in the opinion (marg., pp. 186 to 190).

We have elsewhere attempted to show that the check of an executor, trustee, cashier or agent, given in an individual transaction is not void in itself and is not "nugatory" as the Court stated, but that whether the payee may rightfully receive and is entitled to hold the proceeds of the check, depends on whether under the particular circumstances it was in fact drawn against or paid out of moneys of the estate, or of the bank, or of the principal. In other words, there may be in every case such circumstances as would make the drawing and receipt of such checks a proper and unobjectionable transaction in every respect, and there is no rule of law which makes such a check absolutely void and "nugatory," and in that view it is competent to show that such checks are not unusual or contrary to the course of business, and that their reception by defendants was not, therefore, suspicious.

Shaw vs. Spencer, 100 Mass., 385.
Tanner vs. Hall, 1 Barr., 417.
Claflin vs. Farmers' and Citizens' Bank, 25 N. Y., 293, 298–9.

Had the Court ruled at the trial that the checks on their face carried notice of such defect as would render the instrument invalid, and that as matter of law the defendants could not under any circumstances receive and use the checks, and that *eo instanti* they were received, the defendants were bound to return them and not to use them, the case would have been different. But the Court charged otherwise and conceded that the checks might be available to defendant if certain facts existed. In view of this and of the issue of good faith, was it not proper for defendants to show that it was an every day transaction, and that as a general rule banks and bankers and parties engaged in other financial bus-

iness were in the habit of receiving cashier's checks and applying them to the individual account of the cashier? We submit that it was not, as before stated, for the purpose of legalizing an illegal transaction, but to show that defendants did not act in an unusual manner. In an action against an agent for negligence in the discharge of some duty, the defendant may show that he acted in the mode in which others in like cases customarily and usually acted. There is no objection to this on principle and no authority can be cited against it.

V. The Court erred in admitting evidence as to the condition of the safes in the bank after Warner's flight, and the necessity of breaking open the safes (Marg., p. 124).

This evidence was immaterial, irrelevant and incompetent, and tended to prejudice defendants.

VI. The Court erred in admitting the evidence at marg., p. 115, as to the extent of Warner's dealings with defendants during the period covered by the inquiry. The question had no relevancy to the issues, and tended to prejudice defendants.

VII. The Court erred in refusing to allow defendants to prove (marg., p. 104) that there was in the possession of the Albion Bank, its officers and directors some information or means of information upon which they could draw when it was necessary for them to submit the condition of the affairs of the bank to the inspection of the Bank Examiners.

The proof was that the Bank Examiners made annual examinations (Coan Test., marg., p. 103); also that dividends were regularly declared and paid, except once about 1883 (West Test., marg., p. 161),

The testimony offered bore directly on the question of the knowledge or means of knowledge of the bank,

officers and directors as to the affairs of the bank, and bore directly on the question whether such officers and directors were ignorant of the acts of Warner, or were chargeable with knowledge thereof.

Tenth Point.

The judgment should be reversed.

JOSEPH H. CHOATE,
JOHN E. BURRILL.
GEO. ZABRISKIE.

FILED,
MAR 8 1892
JAMES H. McKENNEY,
CLERK.

MARTIN B. BROWN, Printer and Stationer, 49 and 51 Park Place, New York.

Supreme Court of the United States.

SAMUEL H. KISSAM, HENRY N. WHITNEY and EUGENE R. WASHBURN,
Plaintiffs in Error,

vs.

HENRY J. ANDERSON, Receiver of The First National Bank of Albion,
Defendant in Error.

Brief for Defendant in Error.

This case is brought here by Writ of Error to reverse a judgment upon a verdict of $103,000 principal, and $44,759.91 interest, the amount of twelve checks given to the plaintiff in error between May 11, 1880, and August 26, 1881, as margin upon an individual stock account, by Albert S. Warner, and which checks were signed by Warner as cashier of the First National Bank of Albion, and were drawn on and paid by its New York correspondent, the Third National Bank, and which checks were never entered in the books of the Albion Bank.

The form of the action is, that Warner (who was cashier and then President of the First National Bank of Albion,

of which the defendant in error is Receiver,) was, prior to its failure, speculating in stocks through the plaintiffs in error as his brokers, and supplied them with "margin" in such speculations, which money was the money of the Albion Bank, and was furnished by his drawing the several checks in suit, and also by sending money by express (pp. 4, 5, fols. 9, 10). That the plaintiffs in error received and indorsed these several checks and obtained and received the amount thereof "from the Third National Bank of the City of New York out of and from *the moneys and account* of the First National Bank of Albion kept with the Third National," and thereupon credited the same to Warner and his said speculative account (p. 6, fol. 12).

That the plaintiffs in error received said checks and money with knowledge, that while the checks purported to be drawn for the business of the Albion Bank, in fact, they were drawn for the private stock speculations of Warner, and that they had notice that neither Warner as cashier or president, or the Albion Bank, had lawful authority to speculate in stocks; that such speculations were for his own benefit, *and that he fraudulently misapplied for use in such speculations* the money furnished to the defendant upon said checks.

Complaint, p. 27, fol. 51.

The complaint contained a number of other causes of action for money deposited, etc., which were abandoned upon the trial.

The answer admitted Warner's having an account with the plaintiffs in error but *denied that he ever speculated in stocks through them.* It alleged *that during the continuance of such account,* they by his direction deposited large sums of money with the Third National Bank to the credit of the Albion Bank, which were used and applied by the Third National to pay the checks and drafts *drawn by*

Warner as president or cashier of the Albion Bank, including the checks sued upon, and which moneys were charged to Warner in his account with the plaintiffs in error.

That Warner also deposited in the Third National to the credit of the Albion Bank *other moneys* which were used by the former to pay drafts drawn by Warner as cashier, &c.

It admits that the plaintiffs in error received some checks signed "A. S. Warner, Cashier of the First National Bank of Albion," but denies any knowledge of the receipt of the checks in suit.

It denies that any of the checks were paid by the Albion Bank, "out of any moneys belonging to it or furnished by it," and says that the same were paid out of moneys deposited in the Third National by Warner, or by them, and whatever sums were paid by the Third National Bank in said checks was repaid *to said bank* by Warner, and it denies defendants ever received from Warner in any way moneys, assets or funds of the Albion Bank.

Answer, pp. 30–31, fols. 57–58.

The answer also denies all knowledge of Warner's fraudulent acts and alleges that all moneys received from him were received by them in good faith and for value.

Id. p. 50, fol. 89.

The facts established upon the trial are set forth in the opinion of Judge Wallace, denying a motion for a new trial.

Opinion, p. 97.

The following more detailed statement is submitted, to refer the Court to the different portions of the testimony.

The first National Bank of Albion was a small bank having a capital of $100,000, and a nominal surplus (on its books only) of $20,000.

Anderson's Testimony, p. 68, fol. 125.

It practically belonged to the Burrow's estate, of which Albert S. Warner was managing executor. He held, as such executor, 900 shares, and 20 shares individually; the other stockholders were Louise C. Burrows (the widow of the former owner of the bank), R. T. Coan (bookkeeper), Clement Bliss and W. E. Smith.

These five were the directors. The Board of Directors only met "several times" a year.

Warner was made cashier upon the death of Mr. Burrows in 1879, and became president after November 20, 1881.

In 1880 and 1881, the directors were L. Burrows, Stewart, W. R. Burrows, Louise C. Burrows and Warner, all executors of the Burrows estate, but L. Burrows.

Coan was the only bookkeeper. Stewart was president when Warner was cashier, but he made no entries in the books. Burroughs was appointed cashier after Warner was made president until 1884, when Coan was appointed but did not act. Warner really managed the bank during the period when these checks were being drawn.

Coan's Testimony, p. 57, fol. 103; p. 79, fol. 145.

The home deposits of the bank were in the vicinity of $200,000. Its only New York City correspondent was the Third National Bank, where it kept its balance of twenty or thirty thousand dollars.

Testimony R. Titus Coan, Record, p. 80, fol. 147.

Warner was estimated in Albion to be worth only from 15 to $20,000.

P. 10, fol. 166.

The plaintiffs in error compose the firm of Kissam, Whitney and Company, are bankers and brokers of New York City, and a part of their business was to buy and sell stocks and deal in securities on the Stock Exchange. They succeeded in business Chase & Atkins, with whom Warner had been speculating heavily in stocks. They took Warner's account from Chase & Atkins, together with the stocks composing it and then being carried for him, *amounting to* $348,086.19 *on May* 11, 1880, **and upon the same day called upon him for $10,000 further margin.**

Record, Testimony Eugene R. Washburne, p. 62, fol. 113.

On May 11, 1880, Warner remitted to defendant $10,000 by a draft or check drawn by him as **Cashier of the Albion Bank** on the funds of the Albion Bank on deposit in the Third National Bank, the New York depositary.

The form of this draft or check was as follows *and is substantially identical with all the twelve checks* (aggregating $103,000, see pp. 5 to 13) sent by Warner to plaintiffs in error between May 11, 1880, and August 26, 1881, and to recover the money obtained on which this action was brought.

No. (**Blank.**) NEW YORK, May 11, 1880.

Third National Bank of the City of New York pay to the order of Kissam, Whitney & Co. ten thousand dollars ($10,000).

A. S. WARNER,
Cash. First Nat. Bk. of Albion, N. Y.

See Record, fol. 10, p. 5.
See Exhibit No. 7.

It will be observed that these checks not only were not numbered, but that they did not have on them anywhere

the name of the Albion Bank, *as is customary with all regular cashier's checks.*

Kissam's Testimony, p. 85, fol. 150.

They were cut from an old (dealer's) check book and were different from the regularly numbered drafts of the bank, which could not have been used by Warner without being entered in the draft book.

Testimony of Coan, p. 72, fol. 143.

"The remittance was made by this check * * * was received as a margin upon stocks."

Testimony E. R. Washburn, p. 62, fol. 112.

"The checks introduced by plaintiff, marked 7 to 19 inclusive (copies of these checks are set out in the complaint, see Record, p. 5 to 13), were received by us (defendants) and placed to Warner's credit on his general account."

Id., p. 63, fol. 116.

Between May 11 and December 23, 1880, Warner only gave plaintiffs in error $15,000 in these checks.

See table, p. 75, fol. 137.

There was then a sudden Wall street panic (fol. 139), and Warner, who was then long of stocks, to save himself, appropriated the money of the bank of which he was cashier, by giving the plaintiffs in error the following additional checks of this description:

December 23, 1880	$8,000
January 10, 1881	5,000
" 11, "	10,000
" 13, "	15,000
" 17, "	10,000
" 24, "	10,000
February 1, "	5,000
March 25, "	5,000
Making a total in three months of	$68,000

In August he gave three checks amounting to $20,000 more.

See table, p. 76, fol. 138.

Out of the $103,000 represented by these checks, six, amounting to $54,294, were sent in response to calls from the brokers, and seven, amounting to $48,706, were sent without being called for.

E. R. Washburn's Testimony, p. 77, fol. 140.

None of the checks sued upon were ever entered in the check book, or in any of the other books of the Albion Bank.

Nothing was known in regard to them by the officers or employees of the bank until after the failure, when they were found by Coan, in the bank vault, with the statements by the Third National Bank, hereinafter mentioned.

Coan's Testimony, p. 55, fol. 99.
" p. 56, fol. 100.
" p. 59, fol. 108.
" p. 78, fol. 142.
West's Testimony, p. 89, fol. 164.

Warner also drew a number of similar checks to other parties which he did not enter in the Albion books.

Id., p. 61, fol. 111.

—and used securities of the Bank **and in other ways defaulted to the amount of $381,000.**

Anderson's Testimony, pp. 69 and 70.

The habit of the Third National Bank was to return by mail to the Albion Bank the checks drawn upon it and its statements of account. The statements were sent first and the vouchers afterwards. The statements were sent once a month and the vouchers once in three months.

It was Warner's business, as cashier of the Albion Bank, to examine the monthly statements of account sent by the Third National Bank (the New York depositary) to the Albion Bank and to compare the vouchers returned with the entries in the books. Warner opened all the mails received by his bank.

These statements of the Third National were never compared or checked up by the Albion Bank, because it was behind in its work, so that the books would not show any discrepancy between the two accounts.

"When the bank at Albion closed, many of these returns were found not opened."

Testimony R. Titus Coan, p. 55, fol. 99.
Ib., p. 56, fol. 102.
Ib., p. 60, fol. 110.

Warner put off checking the New York account, saying to Coan (the teller) that he was going to hire an assistant to check up the New York account.

Testimony Coan, p. 80, fol. 146.

In addition to the $103,000 of checks sued upon, Warner paid to the plaintiffs in error *one regular bank cashier's draft for* $706.08, which was duly entered upon the books of the Albion Bank, and no claim upon which was made upon the trial.

See Draft, p. 6, fol. 12.
Coan's Testimony, p. 55, fol. 99.
" p. 56, fol. 100.

This is important as it was the third check the brokers had received, and its receipt gave them *direct notice* of the difference between the form of the checks that Warner was giving them as margin and the regular cashier's blank used by the Albion Bank in its ordinary business.

Besides this $103,000, fraudulently paid to the plaintiffs in error, Warner also paid to them up to September 27,

1881, in other ways $107,703.48, *making their total receipts from him in one year and four months* $210,409.48.

The plaintiffs in error were told by Chase & Atkins that Warner had told them that *other persons than Warner were interested in the account.*

Warner repeated the same thing to Mr. Whitney. No other inquiry or investigation was made by them.

Washburn's Testimony, p. 66, fol. 120.
Whitney's Testimony, p. 85, fol. 157.

Prior to the failure of the bank, the plaintiffs in error out of the $210,409.48 received from Warner paid different parties a large amount of money by Warner's direction.

These payments were:
1—Moneys paid to outside banks and persons.
2—Currency and coin sent to Warner at Albion.
3—Moneys deposited in the Third National Bank to the credit of the Albion Bank.

1. Amounts paid to third parties. These are stated in a table at pages 64 and 65.

The Albion Bank had no business relations with any of these banks or parties and was in no way benefited by these payments.

Coan's Testimony, p. 59.

2. The currency or coin sent by express is stated at page 66.

It was sent to Warner individually and was never received by the Albion Bank and does not appear in its books.

Coan's Testimony, p. 77, fol. 141.
Coan's Testimony, p. 78, fol. 143.

3. Deposits in the Third National to the credit of the Albion Bank.

Between March, 1880, and the failure of the Albion Bank (August, 1884) Warner caused to be deposited in the Third National Bank $281,169.65, *no record of which was entered in the books at the Albion Bank.*

During the same period he drew out $267,782.53 by checks (including those in suit), *which also was not entered in the books of the Albion Bank.*

See table, page 71.

The books of the Albion Bank at the time of the failure showed that it had to its credit in the Third National Bank $5,195.73. In fact, the latter was accredited for $7,000.

Anderson's Testimony, p. 68, fol. 125.

This showed that Warner had, without the knowledge of the Albion Bank, not only drawn out *all the money he had caused to be deposited to its credit in the Third National, but* $12,000 *more.*

Many of the deposits of Warner were proceeds of securities of the Burrows estate and notes and bills receivable of the Albion Bank (p. 69, fol. 127), **which created a liability upon its part to their owner.**

Among the deposits so made by Warner's direction in the Third National Bank to the credit of the Albion Bank (and which he afterwards drew out) were checks of the plaintiffs in error, amounting to $89,202, which deposits extended down to 1884, *three years after the transactions in question* (while the answer only claims as a defense deposits made during the transactions, p. 30, fol. 57).

Four of these checks, viz.: April 17, 1883, $6,000; November 15, 1883, $4,000; November 21, 1883, $8,000, and December 21, 1883, $7,850, making together $25,850,

all of which were nearly three years after the paying of the checks in question, were entered in the books of the Albion Bank, *the others were not entered at all.*

Coan's Testimony, p. 59.

It will be observed that this was much less favorable for the plaintiffs in error than Judge Wallace supposed, as he assumed that the deposit of the $25,850 was "*during the "period covered by the checks in controversy*" while in fact it was from two to three years later.

See Opinion, p. 98, fol. 184.

The only *checks* credited to the account of the Albion Bank in the Third National Bank of New York "during the period of the checks in controversy" were,

April 4, 1881	$8,000
" 14, 1881	5,590
" 23, 1881	9,200
	$22,790

(Coan's Testimony, p. 58, fol. 106), and these checks are in the amount $89,202 referred to in the Judge's opinion (p. 98, fol. 184), and are a part of the amount $89,202, for which the plaintiffs in error filed a claim with the receiver after the judgment in this case was rendered.

It is not seriously contended that their payments should comprise other than the checks (included in their claim) which are shown on p. 58 of the Testimony, from Exhibit "F" to Exhibit "S" inclusive. None of this $22,790 was entered on the books of the Albion Bank, neither was the $25,850 until 1883.

The Receiver took possession of the Albion Bank August 28, 1884, finding the safes locked and Warner gone to Canada.

Anderson's Testimony, p. 69, fol. 125.

Warner was then a defaulter to the bank to the amount of over $350,000.

Testimony, H. J. Anderson, p. 70, fol. 128.

The Court instructed the jury in substance that it was incumbent upon the plaintiff to establish—

1.—*That the money represented by the checks received by the defendants were moneys of the bank which had been misappropriated by Warner*, and

2.—*That when the defendants received the checks they took them with guilty knowledge that Warner in using them was misappropriating the funds of the bank* and that unless they found both these propositions established by the evidence their verdict should be for the defendants.

See Charge of Court, p. 92, fol. 172.

They were further instructed that they might find upon the evidence that Warner was permitted by the directors of the bank to draw such checks for his own use or to use the money of the bank for his own purposes, or they might find that directors of the bank were in collusion with Warner and cognizant of his transactions; that if they found that those who represented the stockholders of the bank as its directors or managers permitted Warner to draw such checks or use the moneys of the bank for his own purposes, not as co-conspirators or collusively, but trusting in his integrity or believing that the bank would not be injured, or through loose management on their part, the plaintiff could not recover; but if they did this collusively their consent could not shelter the defendants because they had no power by virtue of their position to consent to a fraud upon the stockholders.

See Charge of Court, p. 92, fol. 171.
See *Ib.*, 93, fol. 173.

The jury were further instructed that upon the issue whether the defendants received the checks with guilty

knowledge the question was not whether they were negligent in receiving them or in allowing Warner to deal with them as they did, but the question was whether they were guilty of *bad faith.*

See Charge of Court, p. 92, fol. 172.

The language of the Court was: "They are liable only for bad faith; but they had no right to shut their eyes and stop their ears so that they could not see or hear; *and if this was done willfully* they must take the consequences because that would not have been good faith." * * * *Ib.*

"It is enough if (defendants) knew that he (Warner) was speculating with the money of the bank without the consent of those who were authorized to give its consent; if (defendants) knew that, they must take the consequences."

Ib., p. 93, fol. 174.

The Court further charged that defendants were bound to know that a cashier has no authority as such to loan the money of the bank or use its checks for his personal use; that the jury were to infer that the defendants knew this when they received the checks, and therefore, the question was whether the defendants believed that by some special arrangement or confidence Warner was permitted by those who were associated with him in the management of the bank to use its checks and moneys as he did and if the jury found that the defendants so believed the defendants were not guilty of *mala fides.*

Charge, p. 92, fol. 172.
Ib., p. 93, fol. 173.

Defendant's counsel further requested the Court to instruct the jury that the plaintiff, if entitled to a verdict, could not recover any of the proceeds of the checks in suit which had been paid out of moneys deposited in the

Third National Bank to the credit of the Third National Bank by Warner or by his direction.

This the Court declined to charge, and defendant's counsel excepted.

See Record, p. 91, fol. 169.

The jury found a verdict for plaintiffs for the principal of the checks in suit: $103,000, and interest, $44,759.71, in all, $147,759.71.

See Record, p. 96, fol. 189.

Subsequently a motion for a new trial was made and denied, Judge Wallace fully discussing the facts and the law in his opinion.

See Opinion, p. 97, fol. 181.

POINTS.

First.

This Court will not, on Writ of Error, review the facts which the jury must have found in order to have applied the law as laid down by the Trial Judge; if therefore the charge of the Court was unobjectionable, this Court has no jurisdiction but to affirm the judgment.

Woodruff *vs.* Hough, 91 U. S., 596.
Barbarie *vs.* Mobile, 9 How., 451.
Kimbro *vs.* Bullitt, 22 How., 256.
Schuchart *vs.* Allers, 1 Wall., 359.

The only right of the plaintiff in error in this Court is that it shall look to the evidence only for the purpose of ascertaining whether it was competent to authorize the jury to find the facts which made out the right of the prevailing party below to a judgment. If the evidence is

pronounced competent *the Court must found its judgment on all such facts as were legally inferrable therefrom*, in the same manner and with the same legal results, as if such facts were definitely set out in a special verdict.

Hepburn *vs.* Dubois, 12 Pet., 345.

Whether evidence before a jury does or does not sustain an allegation is a question only for the jury and not subject to review by the Supreme Court.

Gregg *vs.* Moss, 14 Wall., 564.

We shall therefore confine ourselves to these two considerations:

A. Was the evidence before the jury legally competent to sustain the verdict?

B. Was the charge of the Court without error?

Second.

Not only was the charge unobjectionable; it was much more favorable to the plaintiffs in error than the law would authorize.

It left the question of the *mala fides* of Kissam, Whitney & Co., in receiving these checks from Warner entirely to the jury as a question of fact, as follows:

"The question of knowledge on the part of the defend-
"ants, of the belief they entertained when they took these
"cheques, is a question *solely and exclusively for you. It*
"*is a question of fact, to be determined upon the evi-*
"*dence.*"

Page 93, fol. 174.

There is abundance of authority that the knowledge of the misuse of the Albion's funds by Warner through the medium of these checks, might have been imputed to the defendants *as a legal presumption* from the form in which they were drawn; since it *prima facie* appeared that they were drafts on the Albion Bank's funds and were being employed by Warner in promoting his private stock speculations.

(*a*) These twelve checks were all signed by Warner as cashier and were made payable *directly to the brokers* (whereas, if he had paid for them they would have been made to his order).

(*b*) Instead of being upon a form bearing the name of the bank engraved upon it and having a consecutive number (as was the case with the third check for $706.08 which the brokers received, p. 6, fol. 12), which was the form in which the Albion Bank drew its regular drafts (p. 78, fols. 142, 143), and that in which all other banks drew such drafts (p. 85, fol. 156), they were *ordinary blank* checks, such as are issued by banks to customers, were not even numbered and were not bank drafts at all according to mercantile usages.

See checks, Complaint, pp. 5 to 12.

(*c*) The amount was enormous—$103,000.

(*d*) Of this $103,000, $68,000 was paid in between December 23, 1880, and March 25, 1881 (three months), *at the time of a Wall street panic*, when Warner was called upon to make his margin good (p. 76, fol. 138).

The form of the checks was notice in law that the man who drew them was surreptitiously using the funds of the bank of which he was an officer for his own benefit. When coupled with the circumstances under which they were drawn it was conclusive proof of that fact.

The indifference of the brokers is shown by their accepting, without inquiry from Warner, as further margin in his individual speculations, Sage's check for $6,518.50, specifically payable to "Albert S. Warner, executor of the estate of R. S. Burrows," and endorsed by him *in that capacity only.*

P. 84, fol. 155; p. 87, fol. 160.

Where, as here, the defect or infirmity *appears on the face of the instrument,* the question whether the party who took it had notice or not is a question of law, and must be determined by the Court as a matter of construction.

Merchants' Bank *vs.* State Bank, 10 Wall., 604, 671.
Goodman *vs.* Simonds, 20 How., 365.
Fowler *vs.* Bentley, 14 Pet., 318.
Brown *vs.* Davis, 3 Term., 80.

In other words, that where, as here, a person receives from another as payment of his personal debt, or for his benefit as an individual, either a check which shows upon its face that it is drawn by the debtor upon some one else's funds which are within his control, or a security which shows upon its face that it is some one else's property of which such debtor is the custodian, it is as matter of law notice that such debtor is wrongfully using the property of other people for his personal benefit, and the receiver accepts it at his peril.

This was, indeed, conceded by the Trial Judge, in writing his opinion denying the motion for a new trial, for, after considering the above cases, he said, "the defendants were not entitled to the instruction that they were only liable if the jury found they took the checks with guilty knowledge that Warner had no authority to use them, *and it would have been proper to instruct the jury that the plaintiff was entitled to a verdict if they found that*

Warner had no authority, actual or ostensible, to use them."

See Record, p. 104, fol. 195.

In Claflin *vs.* The Farmers' and Citizens' Bank of Long Island, 25 N. Y., 293, three checks were drawn by the President of the Bank upon it, and were certified as good by him as president, and were delivered for value and purchased by a third party in good faith. Held that he could not recover, as "the face of the check showing "the president's attempt to use his official character for "his private benefit, every one to whom it comes was put "upon inquiry, and where the certificate is false no "one can recover against the bank as a *bona fide* holder." The Court say, at page 297: "A *bona fide* holder of negotiable commercial paper is a favorite of the law, and his rights are always guarded by the courts with great care and liberality from respect to the great interests of trade and commerce. But I do not think this consideration can be permitted to prevail to sustain the plaintiff's right of recovery upon these checks. Clearly, upon well settled principles, Houghton had no power to accept his own draft or checks in behalf of the bank. The act was a palpable excess of authority, *and any person taking the paper was bound to inquire as to the power of the agent so to contract.* * * * One who takes a negotiable note or bill of exchange purporting to be made by an agent is bound to inquire as to the power of the agent. Within this rule the plaintiffs were bound to inquire whether Houghton had authority to accept his own check in behalf of the bank so as to bind the bank as acceptor. * * * * The plaintiffs cannot be trully considered in a commercial or legal sense bona fide holders of these checks. A bona fide holders of commercial paper must receive the same in the usual course of business, for value, and without any notice of facts tending to impeach the character or validity of the paper as between the original parties. The plaintiff cannot claim the protection of this

rule. They had distinct notice by the face of the certificate and the signature thereto that the acceptance was improper and irregularly made. *It was patent on the paper that the acceptance was a fraud; that the president of the defendant's bank in accepting such checks was violating his duty and using his official character for his personal benefit, and thereby perpetrating an act of dishonesty in palpable violation of his trust.* **No business man of common intelligence could take these checks in good faith and without suspicion or notice of this fraud."**

This latter remark is strikingly applicable to the twelve checks in suit, all unnumbered and destitute of every mark usually put upon cashier's checks as a precaution to prevent just such occurrences as Warner's acts.

In Williamson *vs.* Mason, 12 Hun, page 97, the cashier of the Atlantic Bank, *who held in his own name as cashier,* stock belonging to the plaintiff, hypothecated the shares with a broker to secure a loan *made for purposes of his own private speculation.* The broker claimed that the money he had advanced on these stocks *was a loan to the bank.* The Special Term held that the brokers failed to secure a title to the certificate because they received them under circumstances so suspicious as to make it their duty to inquire before advancing money upon it, whether Taintor was truly acting for the bank or for himself. This was affirmed by the General Term which held that the defendants *could not become bona fide holders of the certificates and circumstances involving such a degree of such suspicion as charged them with the duty of making inquiries which they wholly neglected.* Judge Daniels said: "It appeared that the cashier had been buying and carrying stock on margin through the firm of Wallace Company as his brokers for several years before, and including the period of this transaction. At the time of it they were carrying Pacific Mail stock for him, the price

of which was rapidly falling. On the morning of the day when they made their loan to him he paid them the sum of $10,000 to keep up his margin. From this course of dealing between them and the losses which the decline in prices was entailing upon, him, *they certainly had reason to believe that Taintor required the money*, he was willing to submit to severe terms to obtain, to meet his own losses, and not as he represented, for the convenience of the business of the bank. *They certainly must have suspected what would ordinarily be supposed and has so often proved to be the truth, that the pressure of his straitened circumstance was inducing him to misappropriate what, on its face, appeared to be the property of the bank, in order to relieve the necessities of his situation.* The fact is not to be overlooked or divested of its importance that they were experienced operators, and probably familiar with the fate of others, whose losses in the stock market had so frequently induced them to hazard the commission of crime by the embezzlement of funds and property committed to their charge, in order to avert what appeared to be impending financial disasters. The operations of the cashier were becoming ominous, and as Wallace & Company were conversant with the situation of his affairs, they had good reason to believe that he was seeking his own relief, and not that of the bank in whose name he professed to act. This was a subterfuge merely, and, as experienced and intelligent dealers, it must have been transparently so to them."

In Duncan *vs.* Jaudon, 15 Wallace, page 165, certain stock, which stood in the name of "*S. Jaudon, trustee for Mary T. B. Jaudon*," was deposited by the trustee in the National City Bank, who advanced money on it from time to time. Finally, on the maturity of the last loan, the bank sold the stock by his direction and applied the proceeds to the payment of a debt. A similar loan was obtained from Duncan Sherman & Co., and the money was

applied by the trustee to private speculations. He having become insolvent, Mrs. Jaudon filed a bill against Duncan Sherman & Co. and the National City Bank to reach the proceeds of the property disposed of, and the Court granted the prayer of the bill. The Court held that the lender will be responsible, if he had either actual or constructive notice that the trustee was abusing his trust; *that he will be held to have had this notice when the certificates of stock pledged show on their face that the stock is held in trust and when apparently the loan was for a private purpose of the trustee and this fact would have been revealed on inquiry.* Judge Davis says, "*They* either knew or ought to have known that Jaudon was operating on his own account and *are chargeable with constructive notice of everything which, upon inquiry, they could have ascertained from the cestui que trust.* If this inquiry had been pursued they could not have failed to discover the nature and foundation of the trust and that the trustee had no right to pledge the stock for any purpose. The bank, in its dealings with Jaudon, was guilty of gross negligence and in consequence of this, inflicted serious injury upon an innocent person."

It also held Duncan Sherman & Co. responsible, although the members of the firm never examined the collateral, on the ground that they were bound by the knowledge of their subordinates.

So in Smith *vs.* Ayer, 101 U. S., 320–328, this Court approved the ruling of a case which held that in taking from an administrators assets of the estate in payment of his personal debt, was, *from the nature of the transaction* itself, chargeable with notice that he was committing a *devastavit.*

In Lowrey *vs.* Commercial Farmers' Bank of Maryland, Taney's Circuit Court Decisions, page 310, where the case was one of the misappropriation of corporate stock by an executor, Chief Justice Taney held that if a party dealing

with an executor has at the time *reasonable grounds for believing* that he intends to misapply the money or is in this very transaction applying it to his own private use, the party so dealing is responsible to the parties injured.

In Shaw *vs.* Spencer, 100 Mass., 382, 389, the Court said: "Where one known to be a trustee is found pledging that which is known to be trust property to secure a debt due from a firm of which he is a member, *the act is prima facie unauthorized and unlawful*, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust, as collateral security for the trustees own debt, is a transaction so far beyond the ordinary scope of a trustee's authority and out of the common course of business *as to be, in itself, a* suspicious circumstance, imposing upon the creditor the duty of inquiry.

Third.

Judge Wallace charged that if the defendants really believed that Warner obtained such authority—not by collusion with unfaithful officers or directors, but by an honest arrangement with them to allow him to loan the moneys of the bank to himself, "if the defendants honestly believed that, then they are not liable."

P. 93, fols. 173, 174.

This, again, was a more favorable aspect of the case for them than plaintiffs in error were entitled to.

If the directors had allowed or authorized Warner to draw on the funds of the bank, *ad libitum*, "honestly" as the charge put it (if such action could, under any circumstances, be properly so designated; on this point see the remarks of Benedict, *J.*, in the Taintor case *in fra*, at page 379), without security to the bank, and to use such

funds for his personal speculative purposes they would have been acting without authority and in complete defiance of law. This action on the part of the directors could, in no event, have given sanction to any act of Warner in misapplying to his personal purposes the funds of the bank, so as in law to constitute any person receiving the funds of the bank from Warner, a *bona fide* holder.

§ 5204, U. S. Rev. Stat., provides that no association shall withdraw any part of its capital.

§ 5209, U. S. R. S., provides that no officer shall "embezzle, abstract or wilfully misapply" any of its funds.

Act June 3, 1864, 13 Stat. at Large, 116.

It would certainly be no defense either to a criminal or civil action against Warner that the directors had authorized him to take the money; not even if he had taken it without corrupt intent, or even (as in the case of Taintor) had been directed and authorized by the bank's directors to employ its funds in stock speculations in the hope of restoring its solvency if the result should be successful.

U. S. *vs.* Taintor, 11 Blatchf., 374, 377.

Moreover, the Trial Judge in answer to an inquiry of the jury instructed them that a cashier would have the right to draw checks as cashier and use them for personal purposes with the consent of the managing officers of the bank if he *intended* to deposit funds to meet them (p. 95, fol. 177), which was certainly going to the extreme limit of the law.

If, as the Taintor case held, such authority from the directors would not excuse the cashier in taking the bank's money, it could assuredly not avail third persons receiving the bank's money from the cashier in an action by the bank against them, on the theory that the

bank's directors had authorized the cashier to help himself to the bank's money.

This is particularly the case when, as here, the persons receiving the money never made the slightest investigation to ascertain if any such authorization had been made.

Fourth.

Considered as a whole, the charge of the Trial Judge was much more favorable to plaintiffs in error than they were entitled to. They have therefore no ground for complaint on this appeal.

In a case growing out of a somewhat analogous state of facts, this Court laid down the following requisites which must concur to conclude a bank by the unauthorized act of its officer :

1. The third party must deal with it in good faith.

2. The transaction must not be *ultra vires.*

3. The third party must be unaware of any defect of authority.

4. There must be nothing *to excite suspicion of such defect or of irregularity.*

5. The contract must be one which would be valid under any circumstances *and which the directors had authority to allow the officer to make.*

In such cases an estoppel is created.

Merchants' Bank *vs.* State Bank, 10 Wall., 604, 645.

Of all these five prerequisites to create a third party a *bona fide* holder and to estop the corporation, the trial

Court in the case at bar only insisted on the first, and expressly refused to charge what was equivalent to the fourth.

"They are not liable in this case simply because they failed to exercise due caution. They are not liable upon any theory of negligence."

P. 92, fol. 172.

The Trial Judge stated that he had intended to apply the rule laid down in Martin *vs.* Webb, 110 U. S., 14, but that case went no further than to discuss the power of a bank officer to do acts *which might have been lawfully done by the bank itself*. It has no application to such a case as the present, because the Albion Bank itself, could not through its officers, have lawfully put up the bank's money as margin on stock speculations as Warner was doing.

It is an elementary legal principle that an agent cannot become vested by a principal with a power which the principal could not himself have legally exercised.

4 Co., 24*b*., 11 *id*., 87*a*.

And this is especially true where the act sought to be sustained is not only against public policy but is *malum prohibitum*.

Nassau Bank *vs.* Jones, 95 N. Y., 115; and this principle has been applied even to executed contracts.

Jamison *vs.* C. S. Bank, 122 N. Y., 135, 142.

R. R. Co. *vs.* Keokuk Bridge Co., 131 U. S., at p. 389 and cases cited.

This is abundantly clear, when it is considered that it would have been impossible for the Albion Bank in any way to have ratified or adopted the act of Warner in taking the bank's money; since ratification by a principal of an agent's acts cannot take place where the principal was

forbidden by law to act in the first place. As was said by this Court: "That would be equivalent to saying that an agent not having the power to do a particular act for his principal could give validity to such act by its indirect recognition."

Marsh *vs.* Fulton Co., 10 Wall., 676, 684.

So it has been repeatedly held that an agent cannot recover for money paid on behalf of his principal, where the transaction was in violation of a statute.

Ward *vs.* Van Duser, 2 Hall, 162.
Ex parte Mather, 3 Ves. Jr., 372.
Amory *vs.* Merryweather, 2 B. & C., 575.
Anbert *vs.* Maize, 2 B. & P., 371.
Canaan *vs.* Bryce, 3 B. & A., 179.

Dealing in stocks is not distinctly prohibited by the National Banking Act, but such prohibition is implied from a failure to grant the power.

First Nat'l Bank *vs.* Nat'l Exch. Bank, 92 U. S., 122.
First Nat'l Bank of Allentown *vs.* Hock, 7 Weekly Notes of Cases, 398 (Pa); S. C., 20 Alb. L. J., 45; 9 Rep., 153.
Weckler *vs.* First Nat'l Bank of Hagerstown, 42 Md., 581.

In Jemison *vs.* Citizens' Savings Bank, 122 N. Y., 135, 141, the defendants cashier speculated in cotton futures through plaintiffs as brokers, stating that the bank was acting for its customers. A loss having occurred, plaintiffs sued to recover it. Held that *assuming that the cashier had all the authority the bank could give, the contract was ultra vires*, that plaintiffs were bound to know that a bank was not authorized to speculate in stocks and therefore could not recover.

It follows, therefore, that as the bank itself could not have operated in stocks on a margin, it could not have authorized Warner to do so with its money.

Nor could it have authorized Warner to lend himself the bank's money for this purpose.

An officer may, in the *ordinary* course of business, borrow money of the association, but not for an unauthorized transaction under his official designation.

> Blair *vs.* First National Bank, U. S. C. C., N. D. of Ohio, 1877; 10 Chicago Legal News, 84.

A bank has no authority to lend its credit on personal security.

> Johnson Bros. *vs.* Charlotteville Bank, 3 Hughes, 657.

Fifth.

The circumstances under which Warner was turning over the money of the bank to Kissam, Whitney & Co., were so unusual, so much out of the usual course of bank transactions as to have excited the inquiry of any prudent business man and to authorize the jury to find as they did under the charge of the Court that these stock brokers knew that Warner was taking the bank's money for his own purpose.

Any fact which is sufficient to put a man of ordinary prudence and discretion upon inquiry and upon his guard is sufficient to charge him with the result of his failure to inquire.

> Ellis *vs.* Horrman, 90 N. Y., 474.
> Mass *vs.* M. K. & T. R. R., 83 N. Y., 223, 229.

Circumstances, altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute the most convincing and conclusive proof.

Merchants' Bank *vs.* State Bank, 10 Wall., 604.
Castle *vs.* Bullard, 23 How., 187.

A bank, under certain circumstances, might become a temporary borrower of money on time; yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the agent acting for the bank had special authority to borrow money.

The burden of proof in such a case would be on the lender.

Adams *vs.* Cook Co. N. Bank, U. S. C. C., N. D. of Ill.

This must be equally true as a presumption in the case of a bank officer buying stocks on credit with the bank's money.

It is settled law in this Court that the authority of bank officers does not comprehend the making of a contract which involves the payment of money without an express authority from the directors, *unless it be such as relates to the usual and customary transactions of the bank.*

U. S. *vs.* Bank of Columbus, 21 How., 364.

Persons dealing with an agent, knowing that he acts only by virtue of a deligate power, must, *at their peril*, see in each case that the paper on which they rely "comes within the power under which the agent acts."

The Floyd Acceptances, 7 Wall., 676.

It was there said: "The protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

And in a leading case in this Court, it was said by Judge Story: "Every person who deals with another, acting *prima facie*, *en autre droit*, is bound to see whether the agent acted within the scope of his powers, and, at all events, was bound to know that the agent could not even in virtue of any general power do any act not in conformity to law, since his principal cannot be presumed to have authorized him to violate the law."

Owings *vs.* Hull, 9 Pet., 606, 628.

A bank not being authorized either by its charter or its incidental powers to act as broker or agent in the purchase of stocks or commodities on margin or to speculate therein, where instruments in aid of such speculations are given by officers of banks, the latter are not bound thereby.

Bank *vs.* Hoch, 9 Rep., 153 (Pa.).
Jemison *vs.* Citizens' Savings Bank, 122 N. Y., 135.

Upon this point we would ask the attention of the Court to its remarks in Russell *vs.* Post, 138 U. S., 425, 430, which, *mutatis mutandis*, are exceedingly apposite: "Where the purpose on the part of the borrower is the accomplishment of an act, not merely *malum prohibitum* but *malum in se*, an act criminal by statute and criminal in itself, and where there are surrounding circumstances, trivial it may be, separately considered * * * but the tendency of which is to charge the lender with knowledge of the wrongful purpose of the borrower, *although there may be no direct and positive evidence of guilty knowledge*, a jury may be justified in holding that the loan was made with intent to consummate the wrong."

Sixth.

The citations contained in Points I. to IV. practically dispose of the defendant's requests to charge (p. 91, fol. 169), but it may be as well to consider them seriatim. To the request numbered first to charge: That *actual knowledge* of Warner's fraud or *bad faith* was requisite, we reply that the latter portion of this request is precisely what was left to the jury. "They are liable only for bad faith," p. 92, fol. 172.

The Trial Judge could not have more distinctly left to the jury to say what Kissam, Whitney & Co. believed as to the right of Warner to take the Albion Bank's money by means of these checks, though as we have shown, and as the Judge afterwards conceded, the defendants were not entitled to the instruction.

See Point II., p. 17, *et seq.*

Actual knowledge in the strictest legal sense was not necessary.

Notice in law is equivalent to knowledge in fact.

See Point II., p. *ib.*

So as to the defendants' additional requests to charge, numbered first and second (p. 91, fol. 169), that defendants were not liable on the ground either of negligence or want of due care. These were exactly charged as requested.

"They are not liable in this case simply because they failed to exercise due caution."

"They are not liable upon any theory of negligence."

P. 92, fol. 172.

And the fourth request to charge (as to gross negligence) may very well be implied from the exclusion in

express terms of liability for anything else than "bad faith;" "they are liable *only* for bad faith" (p. 92, fol. 172).

As to the fifth to the ninth requests to charge (inclusive) which were framed on the theory of an estoppel against the bank, the Court left to the jury the question of whether Warner was permitted by the managers of the bank to draw these checks (fol. 171), and in addition, if the defendants *really believed* he had without fraudulent collusion obtained such authority, they were not liable.

See p. 93, fol. 174.

This was far more than plaintiffs were entitled to, and disposed of all the requests to charge based upon the authority given to Warner *by making it a question of the good faith of Kissam, Whitney & Co. alone.*

In addition, we believe we have sufficiently shown from the adjudications of this Court *that no estoppel can be created against a bank in regard to acts entirely outside the powers of the bank, against public policy, immoral in themselves and expressly prohibited by statute.*

See Point IV., p. 27.

Nor will negligence on the part of the owner of stolen property, which contributes to its loss, bar a recovery for conversion against an innocent purchaser, unless it is so gross that the owner may be regarded as consenting to the theft.

Pease *vs.* Smith, 61 N. Y., 477.

But such a presumption could not operate in favor of officers of the bank with limited powers derived from public statutes.

Seventh.

At the conclusion of defendants' exceptions to the refusal of the Court to charge, their counsel asked the Court to charge the jury in accordance with the principles laid down in Simonds *vs.* Goodman, 20 How, 343, which the Court stated it intended to do in making the charge as it did (whereupon it is stated that the defendant's counsel excepted).

P. 95, fol. 177.

But an inspection of Simonds *vs.* Goodman (*sup.*) will show that the decision in that case affords no support to the defendant's propositions and that the Court was more favorable to the defendants in applying the principles of that case than the decision required.

It was there said; "The word *notice* (as applied to bona fide holders) * * * must be understood in the same sense as *knowledge* and indeed that is one of its usual and appropriate significations."

"*Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not is in general a question of construction and must be determined by the Court as a matter of law,*" p. 366.

We submit that each of these unnumbered and cheap blank checks showed upon their face that they were not bank cashier's checks drawn in the regular course of business of a bank, but were surreptitious and fraudulent.

And yet the Court left the question of knowledge to the jury as a question of fact.

As we have contended on the second point of this brief the Trial Judge would have been amply sustained by the authorities both in this Court and elsewhere in im-

puting knowledge to the defendants as a legal presumption.

And the defendants were compelled to admit, that in addition to the checks in suit, they received from Warner and credited to his private speculation account, a check made payable to his order as executor.

Whitney's Test., pp. 85, 87, fols. 159, 160.

So where an instrument for the payment of money bears upon its face the proof that it was executed by one acting in a fiduciary capacity, the holder is bound to inquire what the actual authority is to execute it.

Weeks *vs.* Fox, 3 T. & C., 354 (N. Y.).
Miller *vs.* Crayton, *id.*, 360.

And this is beyond question where the obligation is given to pay the individual indebtedness of the drawer.

See cases in Point II., p. 17.

Mere possession of another's property is not such evidence of ownership * * * that third persons have a right to rely thereon as against the true owner.

Spraights *vs.* Hawley, 39 N. Y., 441.

To defeat the title of a *bona fide* holder it is not necessary to prove that he purchased it with *full and certain knowledge* of the want or failure of consideration; *it is enough if the circumstances attending the transfer were such as to put him on his guard; in such a case he is bound to make inquiry and if he did not*, he purchased at his peril.

Cone *vs.* Baldwin, 12 Pick., 545.

and the burden of proof is on the holder of the note sued on.

Eighth.

There is a vital distinction in the law of negotiable paper as respects the title derived by *bona fide* holders, between what may be called *patent* and *latent* defects. And this distinction lies at the very foundation of the principles on which a correct determination of this case rests.

This is well pointed out in the opinion of Mr. Justice Clifford in Goodman *vs.* Simonds, *supra*, at p. 365.

(A.) "Where the supposed defect or infirmity in the title of the instrument *appears on its face* at the time of the transfer, the question whether a party who took it had notice or not is in general a question of construction and must be determined by the Court as matter of law."

Citing Fowler *vs.* Brantly, 14 Pet., 318, 320, that where paper before maturity carried *on its face* circumstances of suspicion, so palpable as to put those dealing in it on their guard, it required at their hands *strict inquiry* into the title of those through whose hands it had passed. Failing to be thus diligent they must abide by the misfortune their negligence imposed" * * * "the face of the paper betrayed its character and purposes and M's want of authority."

(B.) The other case is "where it is proposed to impeach the title of a holder for value, by proof of any facts and circumstances *outside* of the instrument itself." Here the acts of other parties are in question and he cannot be charged with the consequences flowing from their acts, unless it be first shown that he had knowledge of such facts at the time the transfer was made. * * * And whether he had such knowledge is a *question of fact* * * * and like other disputed questions of *scienter* must be submitted to their determination," etc.

Goodman *vs.* Simonds, at pp. 365, 366.

And again, at the end of p. 366, "Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke, in May *vs.* Chapman, 16 M. & W., 355, for the reason that such conduct, whether equivalent to notice or not, *would be plenary evidence of bad faith.*"

See Smith *vs.* Sac Co., 11 Wall., 139 (1870).

"The rule may * be said to resolve itself into a question of honesty or dishonesty, *for guilty knowledge and willful ignorance alike involve the result of bad faith;* they are the same in effect."

Murray *vs.* Lardner, 2 Wall., 110, 121 (1864).

"Bad faith which implies guilty knowledge or willful ignorance."

Hotchkiss *vs.* National Banks, 21 Wall., 354, 359 (1874).

In fact, it may be asserted, without reference to authority, that one who has such reasonable grounds of suspicion appearing on the face of an instrument as would naturally stimulate to inquiry a person of ordinary prudence and discretion is acting inconsistently with good faith, if, as in this case, he persistently refuses to make inquiry.

Ninth.

The testimony offered of bank and trust company officers and brokers that cashier's checks were taken and treated as cash (p. 82, fol. 150) was properly excluded,

since it was an attempt to prove the existence of a custom, which if it existed was contrary to express adjudications of the courts of New York and of this Court.

A bank check is substantially the same as an inland bill of exchange and the rules applicable to the one are in general applicable to the other.

Chapman *vs.* White, 6 N. Y., 412.
Bank of the Republic *vs.* Millard, 10 Wall., 152.

It is a mere order upon a bank on which the bank is not liable without acceptance, and until then or payment, it is always revocable by the drawer.

Lunt *vs.* Bank of North America, 49 Barb, 221.
Ætna Bank *vs.* Fourth Natl. Bank, 46 N. Y., 82.
Atty-Genl. *vs.* Continental Life, 71 N. Y., 325.

The bank owes no duty to the holder until the check is presented and accepted.

First Natl. Bank *vs.* Whitman, 94 U. S., 343.

The law applicable to bills of exchange as to misappropriation of the funds of drawer by a person acting in a representative or fiduciary character when the fact appears on the face of the instrument and the want of power to ratify or authorize such misappropriation is matter of statute law (see cases cited *supra*) is therefore applicable in all its force to instruments of analogous character such as those on which this action is brought.

Tenth.

The request for a verdict for defendant on the ground that no demand on defendants was proved, was properly denied.

No demand was necessary.

People *vs.* Bank of North America, 75 N. Y., 564.

In order for one to have been requisite, defendants must have come *lawfully in possession* of the funds misappropriated by Warner, and have subsequently converted them.

Hall *vs.* Robinson, 2 N. Y., 293.

But where, as here, the taking is wrongful in its inception, no demand is necessary for a tortious taking is in itself a conversion and no subsequent demand is necessary to maintain the action.

Farrington *vs.* Payne, 15 Johns., 432.

Where there is a tortious taking, or an actual conversion no demand is necessary.

Thurston *vs.* Blanchard, 22 Pick., 18.

Trover lies against a fraudulent purchaser or his vendee with notice without a previous demand.

Ib.

Wherever trespass *de bonis asportatis* lies trover will lie.

Prescott *vs.* Wright, 6 Mass., 20.

Here defendants were trespassers *ab initio* and their possession of the bank's money was never lawful or with its consent.

Trover may be supported where there has been no demand or refusal.

Carr *vs.* Gale, 2 Ware (Dav.), 328.

Eleventh.

First—The exceptions to the refusal of the requests to charge two, three and four, on page 90, fol. 167, should be disregarded.

(*a*) These requests to charge required the Court to direct the jury to credit the plaintiffs in error with

1—*All* deposits made by them in the Third National Bank.

2—With all such deposits which were entered in the books of the Albion Bank, and

3—That no verdict could be rendered for more than the difference between the accounts of the two banks as existing at the time of the failure.

(*b*) Each of these was improper.

The defense set up in the answer was,

1—That the plaintiffs in error had deposited funds *out of which these checks had been paid.*

2—That Warner had deposited in the Third National to the credit of the Albion Bank, moneys *not belonging to the latter*, which it used to pay Warner's checks.

3—That Warner *had repaid to the First National* whatever sums it had paid on these checks.

(*c*) The requests to charge covered not only the deposits make by the plaintiffs in error, between May 11, 1880, and August 28, 1881, but all made down to 1884.

They, therefore, included deposits out of which it was impossible that these checks could have been paid. Consequently these payments were outside the defense set up in the answer that plaintiffs in error had provided the money out of which these checks were paid.

(*d*) There was no proof that the moneys deposited by Warner, or by his direction in the Third National Bank to the credit of the Albion Bank were not the property of the latter bank.

On the contrary it appears that Warner had previously stolen from the Albion Bank large amounts of other moneys than that covered by these checks, including $29,700 paid by means of similar checks to Chase & Atkins, the predecessors of plaintiffs in error and $10,000 to J. B. Manning, making in checks alone $39,700 (p. 71, fol. 130), his total defalcation being $381,000 (p. 70, fol. 129).

Consequently in the absence of proof it must be assumed that what he deposited to the credit of the Albion Bank was its property not his own.

(*e*) When such deposits were entered in the Albion Bank they were not credited against these fraudulent checks *because such checks were not entered in these books.*

Consequently they must have been credited to some other account.

Therefore they cannot be used as an offset to the unentered checks.

(*f*) The requests to charge as to the repayment by Warner were erroneous, as they assumed that the money deposited by Warner in the Third National Bank was a repayment of the money stolen, which was not the case.

See p. 47, *infra.*

(*g*) A refusal to charge a request which is erroneous in any respect is not error.

This principle is elementary.

Twelfth.

The Court properly declined to charge that if the jury found for the defendant in error, the verdict must not exceed the difference between the checks in suit and the sums paid by the plaintiffs in error into the Third National Bank and not entered in the books of the Albion Bank, and the other requests which practically required that they should be credited with all moneys which Warner had deposited in the Third National Bank as an offset to the claim in suit.

Record, p. 91, fol. 168.

Upon this branch of the case we would be content to rest upon the very lucid analysis of Judge Wallace's opinion (see p. 104, fol. 195), commencing, "It is insisted, etc.," to which we would ask the attention of this Court.

The alleged offsets consist:

(*a*) Of the following deposits made by defendants by Warner's direction in the Third National to the credit of the Albion Bank.

Deposited during this period:

1880. October 6, check entered in Albion books		$4,480 00
1881. April 4, check not entered		8,000 00
" 14, "		5,590 00
" 21, "		9,200 00
" 27, entered, currency by exp		8,000 00
1881. June 30, not entered, coin by cashier		5,000 00
		$40,270 00

Coan's Testimony, case, page 58.

Deducting the coin and currency $13,000 00

Leaves for checks deposited	$27,270 00
Checks (running down to 1884) subsequently deposited	35,982 00
Making a total of	$63,252 00

Coan's Testimony, case, page 59.

This $35,982 was long after the giving of the checks in suit and has no connection with the defense in suit which is not that *Warner* made these checks good to the bank but that they were paid, not out of the funds of the Albion Bank, but out of moneys deposited "during said period" by *Warner*. (Page 30, fol. 57.) Included in this amount is also a number of checks which were credited in the Albion Bank to the Burrows estate and others.

This, of course, created a liability of the bank to those *parties*, and was in no sense a payment by Warner of what he had previously stolen.

(*b*) Of moneys *deposited by Warner* which were not entered in the books at Albion, the only proof as to which is that a few came from persons not known by Coan to have any business with the Albion Bank.

The remainder are not identified.

It is shown that some of these were the proceeds of securities of the Albion Bank embezzled by Warner, viz.: proceeds of bank bonds, $30,000.

Case, page 69, fol. 125.
Case, page 67, fol. 123.

Warner was a defaulter for $350,000.

This amount exceeded the bank's entire capital of $100,000, its surplus of $20,000, and its deposits of $200,000.

Case, page 68, fol. 125.
Id., page 80, fol. 147.

And its account in the Third National was the medium by which he robbed it.

Case, page 56, fol. 104.

(c) *It will be observed that defendants never pretend to have repaid to the Albion Bank any part of the moneys they received from Warner.*

They have always denied and still deny that the receipt of these checks made them in any way the bank's debtors.

This in itself is utterly inconsistent with the idea of there being any *payment* by them, for there can be no payment where no debt is admitted.

(d) All that defendants did was, that having received $103,000 of the bank's money from Warner through the checks in suit *and* $107,403 *from other sources*, making together $210,409 (Kissam's testimony, case, page 86, fol. 159), they from time to time, *by Warner's direction*, deposited certain amounts in the Third National to the credit of the Albion Bank, *and advised Warner of such deposits.*

Washburn's Testimony, page 75, fol. 137.

This was not a return of the money represented by the checks in suit to the Albion Bank, but was a paying over by Warner's order of *other moneys* belonging to Warner, which they admitted they held for him. In other words, though the account in the Third National Bank nominally might have been in the name of the Albion Bank, yet, in fact, Warner in his transactions was treating it as his own private account, drawing on it and depositing in it individually. While the money *he drew from it* was the property of the Albion Bank, what he put in it was his own, unless it could be shown that it came in fact from the Albion Bank. But the mere fact of Warner's depositing money in it in no way of itself concludes the Albion Bank from reclaiming its stolen funds.

The broad principle we contend for is this: that the payments into the Third National Bank were purely voluntary payments by Warner, **and cannot be an offset to moneys tortiously taken unless accepted as such.**

(*e*) Of these deposits some were reported to the Albion Bank and were credited upon its books (thus making a liability of the bank to the persons to whom they were credited).

Coan's and Anderson's Testimony.

The remainder were not communicated to the Albion Bank, and *before they were discovered*, they, together with the other moneys deposited by Warner and which were not entered upon the Albion books, *were withdrawn by him without its knowledge.*

It was as if Warner had stolen a bag of gold from the bank and given it to defendants who accepted it, knowing it to be stolen. That subsequently defendants had given Warner *another* bag of gold **which he had hidden over night in the bank safe without its knowledge and taken it away again the next morning.**

Can it be pretended that such a transaction would have been a payment of the moneys contained in the bag originally stolen?

It is no defense that one who converts property belonging to A. by receiving it from B. (the tortious servant of A.), has, by the latter's orders, deposited it in a bank to the credit of A. In order to constitute such a defense, *the bank must be shown to have applied it to A.'s account, with the consent of A.*

(*f*) It is shown that Warner was using the Third National of New York as a cover for his operations. That

he concealed both the drawing of the checks and the subsequent deposits from his own bank, *that he was always largely indebted to it, and finally appropriated all the money constituting this deposit,* and is a defaulter to the amount of $350,000.

Testimony Coan, pp. 55, 56, 60.

It therefore appears that the Albion Bank *did not, in fact, receive the money deposited to its credit* in the Third National by Kissam, Whitney & Company.

What the Third National did was legal, as it had no notice, either actual or constructive, that Warner was not acting within the scope of his authority; it thereupon fulfilled its duty when it paid his checks, and was not bound to see to what purpose the funds were applied. But its entries upon its books do not conclude the Albion Bank in this litigation with third parties, who, of their own knowledge knew they were applying the Albion's money to Warner's private speculations. Any transactions between Kissam, Whitney & Co. and the Third National are, therefore, as to this litigation, *res inter alias acta.*

(*g*) The form of this action is *for conversion*, for receiving the money on these checks with knowledge it was the property of the bank. This the verdict of the jury establishes was done. Under what possible rule of pleading or of law is this defense of a return to the wrong-doer and his deposit of it admissible when, as here, it is proved that the owner never knew it?

Before a wrong-doer can claim a mitigation of damages for conversion in case of a return of the property, *the owner must have accepted its return or resumed his dominion over it as owner.*

People *vs.* Bank of N. A., 75 N. Y., 548, 564.

A wrong-doer cannot discharge himself by any act of his own without the assent of the injured party. Therefore, it is no defense that property improperly taken was thereafter sold upon process in favor of the taker against the owner.

Although the proceeds at such sale went for the owner's benefit, yet, as it was conferred without request it would create no legal obligation on the part of the plaintiff to refund, or in any other way account for the money. As the value of a benefit thus conferred could not be recovered in an action, the same thing cannot be done in another form by using it as an offset or by way of satisfaction.

Otis *vs.* Jones, 21 Wend., 394, 396.
Hammer *vs.* Wilsey, 17 *Id.*, 91 (cited and approved in 75 N. Y., *supra*).

(*h*) It is a matter of no import what disposition of the property is made by one who converts it from the dominion of the real owner.

This has been so held even where the conversion was by a servant or agent who had never assumed to have any *personal* right of ownership in the thing converted. In such cases the agent or servant has been held liable since the gravamen of the action is the exercise of dominion over the property of another in derogation of the rights of the true owner.

In Hollins *vs.* Fowler, L. R., 7 H. L., 766, 768, defendants had bought cotton *innocently* and without negligence, from a holder who had obtained it by fraud and had no title, and they had immediately resold it to a firm for whom they habitually acted as cotton brokers, not making any profit beyond a broker's commission. Held, that they were liable to the true owner.

It was said by Blackburn, *J.* (pp. 764, 768), that the ultimate purchasers would have been liable likewise had the plaintiffs thought fit to sue them.

Lord Chesford stated the principle of law thus:

Any person, however innocently, who obtains possession of the goods of a person who has been fraudulently deprived of them and disposes of them whether for his own benefit or that of any other person is guilty of a conversion (p. 795).

"Certainly," observed Lord Ellenborough, in McGombie *vs.* Davies, 6 East, 540, "a man is guilty of conversion who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect."

Every person who aids and assists in the act of conversion is responsible for the entire damage that has been sustained, although he acted only as the friend of another wrong-doer, the real principal in the transaction or is merely a servant obeying his master's orders, and had no idea of committing any wrongful act himself. *It is no answer that he acted under authority from another, who had himself no authority in the matter.*

Parker *vs.* Godin, 2 Str., 813.
Stephens *vs.* Elwall, 4 M. & W., 261.

Satur, a bankrupt at the time of absconding left some plate with his wife, who, in order to raise money upon it, delivered it to her servant, who went along with the defendant to the door of Mr. Woodward, the banker, and there the defendant took the plate into his hands and went into the shop and *pawned it in his own name, gave his own note to repay the money*, and immediately upon receipt of it, went back to the bankrupt's wife and delivered the money to her. In trover for the plate, the jury (considering the defendant acted only as a friend and that it would be hard to punish him) found a verdict for the defendant.

But upon application to the Court a new trial was granted, upon the fact of its being an actual conversion in the defendant, *notwithstanding he did not apply the money to his own use.*

And upon a second trial the plaintiff obtained a verdict for the value of the plate.

Parker *vs.* Godin, 2 Str., 813.

A bankrupt being indebted to G. delivered goods to G.'s servant, who gave a receipt for them in his master's name, and sold them for his master's use, the Court determined that the sale, whether for the use of the seller or another, was a conversion *in the servant*, for where a person takes upon himself to dispose of another's property, it is a tortious act and the gist of the action.

Perkins' Assignee *vs.* Smith, 1 Wils., 328.

(*i*) Whatever moneys were on deposit in the Third National to the credit of the Albion Bank were the property of the latter. It was immaterial from what source they were derived. It was also immaterial whether they were entered in the Albion books. Their receipt by the Albion Bank made the latter liable to refund them to the true owner. Warner's knowledge of their ownership was the knowledge of the bank for this purpose.

Fishkill Savings Bank *vs.* Bostwick, 92 N. Y., 564.

(*j*) It is not shown that the moneys from which the checks in suit were paid were not the moneys of the Albion Bank.

The checks themselves are, on their face, the drafts of that bank and could only be paid out of its funds.

It would be immaterial if there had been no funds and if the Third National had advanced the moneys to meet them, so long as they were in fact paid.

It is shown by the Receiver that the bank was ruined by Warner's converting its assets into money, which he deposited to its credit in the Third National and then drew out at pleasure, concealing both the deposits and the checks, the ultimate result being that he embezzled the whole.

Does the fact that these transactions were fraudulently kept by Warner out of the Albion books deprive that bank of the title to the moneys which actually stood to its credit and were paid to the defendants by the checks of the cashier?

(*k*) The only possible way for defendants to have absolved themselves from liability, was to prove that Warner was not at the time of the failure of the bank indebted to it.

Then, perhaps, it might be contended that the Albion Bank had, as a matter of fact, not been damnified by the payment of these checks.

This, however, is not pretended. But the claim is seriously made, that because Warner made deposits in this account and afterwards drew them out, keeping both the deposits and their withdrawal concealed, that that condones his first theft, and consequently discharges the person who took the stolen property knowing it to be stolen. No such principle of law exists.

(*l*) Again, even if Warner did make deposits of his own money and mingle them with the moneys of the First National (an entirely gratuitous assumption) he (Warner) is the only person who can complain and he is not before the Court.

(*m*) If such payments by Warner are to be regarded *as purely voluntary*, made without any request from the Albion Bank either express or implied, Warner could not recover

them back in an action brought for that purpose and these defendants can be in no better position than he.

See cases, *supra*,

Also

Wickes *vs.* Mayor, 79 N. Y., 621.
Ingraham *vs.* Gilbert, 20 Barb., 151.
Montgomery *vs.* Gibbs, 40 Iowa, 652.
Suidam *vs.* Fuller, 31 Hun, 500.

Besides, if Warner paid in to the Third National Bank moneys which he directed to be credited to the Albion Bank, the presumption is that they were the property of the latter and this has not been overthrown by proof.

(*n*) It is proved that Warner has been at all times since May, 1881, a debtor to the bank.

He had fraudulently paid to Chase & Atkins and to Manning $46,000 *before defendants deposited anything.* He afterwards ran up these fraudulent checks to $88,000.

He also embezzled other moneys.

How, therefore, can it be said that the deposits he made, or which the defendants made by his direction, went to extinguish the liability of the defendants created by the receipt of these particular checks ?

Thirteenth.

(*c*) **Warner himself never credited the moneys he deposited upon any particular account. It therefore follows that the bank and after its failure, the Receiver could credit what he paid upon any part of his indebtedness they saw fit.**

The bank made no credit because it was in ignorance of the transaction. The Receiver has decided to credit those deposits upon Warner's general indebtedness and not upon the indebtedness arising upon the checks in suit.

The defendants having merely made these payments by Warner's directions, have no authority to dispute the Receiver's action in this respect.

Fourteenth.

The question of agency does not arise in connection with the making of these deposits.

(*a*) Warner did not give the instructions to Kissam, Whitney & Co. to deposit the money in question as cashier of the bank acting for its account, but as their customer, to make *him* in this way a payment on account of what they owed him, and they charged what they paid to him.

(*b*) They had had notice (as the jury have found) by the face of the checks and the other circumstances that he was a fraudulent and dishonest agent and therefore took his instructions at their peril.

Fifteenth.

The refusal of the Court to charge that plaintiff was not entitled to recover from the defendants for the $10,000 check, Plaintiffs' Exhibit "15," January 24, 1881 (p. 91, fol. 168), was proper.

The small portion of the testimony presented upon this appeal makes the facts somewhat obscure. The following however appears. Warner on October 15, 1880, borrowed from the Bank of New York $30,000, $14,000 of which was deposited in the Third National Bank to the credit of the Albion (p. 67, fol. 123), but was not entered in the books of the latter (p. 58, fol. 105). Out of the remainder the plaintiffs in error received October 15, 1880, $6,000, and October 30, $8,000, leaving $2,000 not accounted for (p. 67, fol. 123).

On January 25, 1881, plaintiffs in error paid the Bank of New York the $30,000 loaned to Warner (p. 67, fol. 122). The check of $10,000 the subject of the request was sent to them by Warner, as they say, to be used in payment of this loan (p. 77, fol. 141). *They, however, collected and credited it to Warner's general account out of which they made the payment* (p. 63, fol. 116).

The securities held as collateral for the $30,000 loan were received by them from the Bank of New York and sent Warner (p. 77, fol. 140).

The Albion Bank had no dealings with the Bank of New York (p. 59, fol. 140).

It is claimed that because $14,000 of the money obtained from the Bank of New York upon this $30,000 loan had been deposited to the credit of the Albion Bank in the Third National, and because the plaintiffs in error after receiving the $10,000 check, Ex. "15," paid the whole

loan of $30,000, that it must be assumed that this $10,000 check was not paid out of the moneys of the Albion Bank, but out of Warner's $14,000 which he had borrowed from the Bank of New York.

The checks in suit show that plaintiffs in error in the thirty days between December 23, 1880, and January 24, 1881, had received of these bogus checks $58,000 (including this of $10,000) and had been thereby fully notified of Warner's desperate condition, and (as the jury have found) took this last check *willfully* with notice that he was using the bank moneys without authority; in other words that he was stealing them.

Under what principle can it be held that they are entitled to claim that this $14,000 which Warner while a defaulter in an amount far exceeding these checks, had deposited without the knowledge of the Albion Bank and which did not come from these brokers, did not become a part of the assets of the Albion Bank, but remained *impressed with a trust for the benefit of the thief*, so that when he subsequently fraudulently drew upon the general account of Albion Bank, the law will hold that he only drew upon this $14,000 and was doing nothing wrong.

In other words to apply to a wrong-doer the principle of equity which enables one whose money has been stolen and deposited with money belonging to a wrong-doer to claim that the wrong-doer's drafts upon the amount are to be charged against his own money rather than to that which belonged to an innocent party.

Such a principle would be subversive of justice. It would place a premium upon official peculation. In a case like this, where a bank cashier has juggled with the funds entrusted to him, using part of it for margins in Wall street and part in other speculations and covering his tracks with false entries, a recovery of the money stolen

from the receiver is impossible, except by the application of the well settled rules above mentioned.

1. Was the money the property of the bank.
2. Was it taken with notice.

Sixteenth.

There is no foundation for the assertion that the Receiver settled this account with the Third National.

He never did anything in regard to it.

Anderson's Testimony, case, page 50.

He had nothing to do with the endeavor of the Burrows estate to save the securities pledged by Warner.

Id., case, pages 51, 65.

It was, however, an immaterial matter.

Seventeenth.

Interest was properly allowed.

"It is entirely a question for the jury what damages they will allow. Juries have not much compassion for trespassers, and they are not bound to weigh in golden scales how much injury a party has sustained by a trespass."

P. Anderson, B., in Lodley *vs.* Pye, S. M. & W., 135.

The damage is the value of the property at the time of conversion with interest to the time of trial. This is the general rule.

Sedgwick on Damages, vol. I., 368.
Wehle *vs.* Haviland, 69 N. Y., 448.
Bk. *vs.* Bk., 60 N. Y., 40.
Tyng *vs.* C. W. Co., 58 N. Y., 308.
Suydam *vs.* Jenkins, 3 Sandf. (N. Y.), 614, 626.

It is no answer to our claim of interest to say that this money would have remained in the Third National without earning interest if it had not been stolen by Warner, any more than to refuse interest to an individual whose money had been converted because he would not be likely to have invested it so as to have earned interest.

The law does not consider such remote contingencies.

Eighteenth.

The judgment of the Circuit Court should be affirmed.

George W. Wingate,
Benjamin H. Bristow,
Counsel for defendant in error.

Office Supreme Court
FILED.
MAR 9 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 202.

OCTOBER TERM, 1891.

SAMUEL H. KISSAM AND OTHERS,

Plaintiffs in Error,

against

HENRY J. ANDERSON, RECEIVER OF THE FIRST NATIONAL BANK OF ALBION.

BRIEF

FOR DEFENDANT IN ERROR.

B. H. BRISTOW,

Of Counsel.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

Supreme Court of the United States,

ERROR TO THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL H. KISSAM, HENRY N. WHITNEY and EUGENE R. WASHBURN, Plaintiffs in Error,

AGAINST

HENRY J. ANDERSON, Receiver of the First National Bank of Albion.

No. 202.
October Term, 1891.

BRIEF

for the defendant in error.

STATEMENT.

Between May 11, 1880, and August 26, 1881, one Albert S. Warner was cashier of the First National Bank of Albion, which kept an account with the Third National Bank of New York City (pp. 54, 80). At the same time the defendants were co-partners as stockbrokers at New York under the firm name of Kissam, Whitney & Co., and Warner was engaged in personal speculations in stocks through them (pp. 61, 63). During said period he delivered to said firm twelve certain checks aggregating $103,000. These checks were all drawn to the order of Kissam, Whitney & Co. upon the Third National Bank and were signed "A. S. Warner, Cashier First National Bank of Albion, N. Y." (pp.5–12, 55, 63.) The dates and amounts of said checks were as follows:

May 11, 1880	----------	$10,000
June 9,	" ----------	5,000
Dec. 23,	" ----------	8,000

Jan. 10,	1881	5,000
" 11,	"	10,000
" 13,	"	15,000
" 17,	"	10,000
" 24,	"	10,000
Feb. 1,	"	5,000
Mch. 25,	"	5,000
Aug. 9,	"	10,000
" 26,	"	10,000
Total		$103,000

These checks were all endorsed by defendants and presented to the Third National Bank, and paid by it out of funds on deposit to the credit of the First National Bank of Albion (p. 55). The proceeds were credited by defendants to said Warner in his account with them, embracing his stock speculations aforesaid (p. 55).

The defendants at various times made deposits in the Third National Bank to the credit of the First National Bank of Albion, amounting in all to $89,202.50. Such deposits were made by Warner's direction, and were charged by defendants against Warner's speculative account with them. Some of the deposits so made were entered in the ledger of the First National Bank of Albion, but the majority of them were not. The following is a statement of the details of such deposits (pp. 58, 59) :

	Date.	Entered in Ledger of Albion Bank.	Not entered in Ledger of Albion Bank.
Ex. G.	April 4, 1881		$8,000 00
" H.	" 14, "		5,590 00
" I.	" 23, "		9,200 00
" J.	April 3, 1882		10,000 00
" K.	March 7, 1883		5,000 00
" L.	April 17, "	$6,000 00	
" M.	November 15, "	4,000 00	
" N.	" " "		5,000 00
" O.	" 21, "	8,000 00	
" P.	December 31, "	7,850 00	
" Q.	March 7, 1884		5,000 00
" F.	April 11, "		5,000 00
" R.	July 28, "		8,000 00
" S.	" " "		2,562 50
	Totals	$25,850 00	$63,352 50

Warner's connection with the Albion Bank continued until August, 1884. He then absconded, owing the bank $381,000 (p. 70). The bank suspended payment, and plaintiff was appointed its receiver (p. 54).

This action was thereafter brought to recover the damages sustained by reason of the foregoing facts (pp. 3–12, 27). The allegation of the complaint is that defendants received these moneys of the Albion Bank with knowledge that Warner was misappropriating them (p. 27). That is, in brief, that Warner stole the Bank's money and the defendants received it with knowledge. There can be no question that this would give rise to a cause of action in tort cognizable at law (United States vs. State Bank, 96 U. S., 30; Pierson vs. McCurdy, 33 Hun, 520, 527, 530, affd. 100 N. Y., 608). Under the statutes of the state the acts thus described constitute grand larceny (Penal Code, Secs. 528, 550; Birdseye's Statutes, 1794, Sec. 1; 1797, Sec. 23). It is idle to suggest that there has been any waiver of the claim in tort. The complaint expressly alleges the guilty knowledge, and that is necessarily the gravamen of the action.

The trial was before a jury. The court charged that plaintiff was not entitled to a verdict unless the jury believed that the defendants had acted in bad faith (p. 92), believing that Warner had taken the money of the bank, without its authority, to use for his speculations (p. 94). The plaintiff had a verdict for the amount claimed, with interest (pp. 52, 96). A motion for a new trial was denied upon grounds stated in the opinion on said motion (pp. 97–107), and judgment was duly entered upon September 18, 1888, for $151,456.32 (p. 53). This writ of error has been prosecuted to review alleged errors upon the trial (p. 1).

Notwithstanding the practice in that regard (Farrar vs. Churchill, 135 U. S., 609), the record contains no proper assignment of error. It is, therefore, somewhat uncertain upon what grounds plaintiffs in error intend to rely. It will, however, be shown that, (1) no error was committed in the rulings during the trial; (2) the rule of liability was stated to the jury even more favorably to defendants than the decisions warrant, and (3) defendants were not entitled to the exclusion from the verdict of the item claimed in that regard, or to a credit for the sums paid by them to the Third National Bank.

BRIEF OF ARGUMENT.

FIRST.

No error was committed in the rulings during the trial.

1. Upon cross-examination of a clerk of the Albion Bank defendants' counsel asked him what was submitted to the bank examiner, upon the occasion of his ordinary examinations, regarding the state of the account between the Albion Bank and the Third National Bank. The plaintiffs' counsel objecting to this as immaterial, the court sustained the objection, but ruled that it was to be assumed that these matters were submitted to the bank examiner, and that defendants might show that the vouchers submitted by the Third National Bank to the Albion Bank came under the observation of the directors of the latter (p. 57). It is quite obvious that this ruling fully protected defendants' rights. In any event the witness a little later stated his entire knowledge as to what was shown to the bank examiner (p. 57, 60).

2. Plaintiff inquired regarding the amount of Warner's indebtedness to the Albion Bank at the time of its failure and offered certain checks for the purpose of proving the facts in this regard to which the defendants objected (pp. 61, 68). It was obviously proper to make this proof for the purpose of showing the loss to the bank by reason of the checks in suit. So, too, with regard to the testimony introduced by plaintiff to show that certain shipments of currency to Warner, to which one of the defendants had testified, never were received by the Bank of Albion (pp. 77, 78).

3. One of the defendants was interrogated regarding the extent of Warner's stock speculations through them (p. 63), and their account with him was offered in evidence (p. 68). To this defendants' counsel objected. But these were the precise transactions in the course of which defendants received the checks. It was certainly competent to show all their details. For the jury was to determine, in view of all the facts, whether defendants were chargeable with notice that Warner was misappropriating the funds of the bank.

4. Defendants offered in evidence a check drawn by A. S. War-

ner on the Bank of New York upon October 15, 1880, for $14,000, payable to the order of C. N. Jordan and paid to the Third National Bank and credited by it to the Albion Bank (pp. 65, 66). This was excluded. No suggestion was made nor is it apparent how this could possibly be material. Moreover, its exclusion did not injure defendants as its contents (p. 65) and also the purpose for which it was drawn (p. 67) were fully stated by the witness.

5. Plaintiff was asked regarding the manner in which he obtained access to the safes when he was appointed receiver (p. 68). To this defendants' counsel objected. It was of the slightest possible importance but was clearly admissible as showing the circumstances under which he succeeded to the rights of the Albion Bank and became possessed of its books and of these checks.

6. Defendants called several witnesses for the purpose of showing that there is in New York a custom or usage with regard to receiving cashier's checks in individual transactions with such cashier; that there was no difference customary between the acceptance of checks drawn by a cashier for his own account individually and checks drawn by a cashier for the account of other persons (pp. 82, 83, 84). This was excluded as immaterial. Obviously this ruling was correct. The custom could not have aided defendants unless it was to accept cashier's checks in their individual transactions without inquiry. And such a custom could not vary the rule of law holding that such checks are presumptively unauthorized (see *infra*, p. 8).

> In Shaw vs. Spencer, 100 Mass., 382, evidence was offered to show that it was a matter of common occurrence to buy and sell certificates standing in the names of individuals as trustees upon mere endorsement of the owner without inquiry as to authority by which, or use or the purpose for which the transfer was made (p. 385). It was held that such proof was inadmissible. "A "usage to disregard one's legal duty or to be ignorant of a rule "of law, and to act as if it did not exist, can have no standing "in the courts (p. 394).

7. Defendants' counsel interrogated a witness regarding defendants' reputation and standing (p. 83). This was excluded. Obviously it was immaterial, especially as their reputation was not assailed.

8. The defendants testified that it had always been their custom to receive cashier's checks as cash in their individual transactions (pp. 84, 85) and that the checks now involved were received in good faith and in the belief that they were properly obtained from the bank by Warner (pp. 84, 85). On cross-examination their attention was called to a check drawn to the order of Warner as executor, endorsed by him to the defendants and collected by them, and they were asked whether that check also had not been received by them and credited in Warner's individual account; the check was offered (pp. 84, 85, 86), and they were asked whether it was also their custom to receive checks to the order of an executor in his individual transactions (p. 87). All of this was under objection of defendants' counsel. As they had themselves introduced the subject of their business methods, this was fair cross-examination on the subject. And even if there had been any error, it would have been remedied by the subsequent admission of the facts regarding the check by defendants' counsel (p. 87). Still further, the testimony could not have prejudiced the defendants because they proved that this check had not gone to the benefit of the speculative account, but the amount was immediately withdrawn by Warner (p. 87); and the jury could, therefore, have drawn from the facts no inference prejudicial to the defendants.

This includes all rulings upon the trial save one regarding an offset claimed by defendants (pp. 78, 79) and which will be discussed hereafter. It is manifest that they were correct.

SECOND.

The rule of liability was stated to the jury quite as favorably as was warranted by the decisions.

The charge in that regard may be briefly stated as follows. The defendants are not liable in this case simply because they failed to exercise due caution. They are not liable upon any theory of negligence. They are liable only for bad faith. Warner had no right under the ordinary authority of a cashier to transfer the funds of the bank, by drafts drawn by him in his official capacity, to his own private use. The defendants are chargeable with knowledge of this

rule. But the jury may find upon the evidence that Warner, by an honest and not collusive arrangement with the directors or officers was authorized to loan the money of the bank to himself in this manner, and in that case the defendants are not liable. Still further, whether this was the case or not, if the defendants really believed that Warner had such authority, they are not liable. If, however, Warner had no such authority and the defendants believed that he had taken the money without authority, they are liable. The question of knowledge on the part of the defendants, of the belief they entertained when they took these checks, is a question solely and exclusively for the jury (pp. 92–95).

The court was asked (pp. 91, 92) to give instructions in the language of some general expressions regarding the authority of bank cashiers contained in Martin vs. Webb (110 U. S., 7, 15). Those expressions were carefully limited to the facts peculiar to that case (110 U. S., 14), which were wholly different from those now involved. Moreover, the defendants were given the benefit of every possible inference from the testimony in that regard; for the jury was instructed that it was at liberty to find upon the testimony that Warner's acts were authorized by the directors, and that, if they did so find, that was the end of the case (pp. 92, 93).

But, in any view, this instruction was more favorable to defendants than is warranted by the law. "A person dealing "with a corporation is chargeable with notice of its powers and "the purposes for which it is formed, and when dealing with "its agents or officers is bound to know the extent of their "power and authority" (Jemison *et al.* vs. Bank, 122 N. Y., 140; Davis vs. Old Colony R. R. Co., 131 Mass., 222; Relfe vs. Russells, 103 U. S., 222; Canada Southern R. R. Co. vs. Gebhard, 109 U. S., 527). A national bank cannot deal in stocks. The prohibition is to be implied from failure to grant the power (First Nat. Bk. vs. Nat. Exchange Bk., 92 U. S., 122).

Therefore, if it be intended to claim that the directors knew or should have known of Warner's dealings with plaintiffs in error, and authorized or approved of them either by special arrangement or general permission or usage, such claim is without merit because it is reliance upon unlawful conduct on the part of directors to validate Warner's acts. If the claim is that the directors knowingly permitted Warner to lend the funds of the bank to himself regardless of the use to be made of them by himself, it equally assumes unlawful and prohibited conduct by the directors; for such loan was largely in excess of the amount permitted by statute (R. S., Sec. 5200).

So that in any view the charge of the court below in this regard was more favorable to plaintiffs in error than the law authorized.

The court stated these principles to the jury in several forms. They covered the case and embraced all instructions necessary to present to the jury the precise question upon which they were to pass, and they were even more favorable to defendants than the decisions warranted. The charge was, in brief, that defendants were liable only in case the jury found that they had acted in bad faith—that they had believed that Warner was appropriating the funds of the bank without authority. But it has repeatedly been held that where one standing in a fiduciary capacity uses in his own transactions money or property which upon its face belongs to the trust, that alone puts parties dealing with him upon inquiry—they are bound by the facts irrespective of what their belief may have been in reference thereto.

In Duncan vs. Jaudon, 15 Wall, 165, the defendant pledged for a loan to himself certain stock standing in his name as trustee. It was held that the pledgee was charged with notice that such use of the trust property was unauthorized. To similar effect is Smith vs. Ayer, 101 U. S., 320, 328.

In National Bank vs. Insurance Co., 104 U. S., 54, the bank had a deposit account in the name of one "Dillon, general agent." It was held that the bank had no right to charge against this account an individual obligation of Dillon. The same thing is held in Baker vs. Bank, 16 Abb., N. C., 458 (New York Court of Appeals); *ex parte* Kingston, L. R., 6 Ch. App., 632.

In Claflin vs. Farmers' Bank, 25 N. Y., 293, certain checks were drawn upon the bank by its president for his own purposes. It was held that any person taking the paper was charged with notice that the certification by the president of his own draft upon the bank was unauthorized. It was patent on the face of the paper that the acceptance was a fraud.

In Gerard vs. McCormick, 41 N. Y. State Rep., 284 (New York Court of Appeals), one Boswell paid an individual debt to defendant with a check signed "Boswell, Agt .Glass Buildings." It was held that the presumption is that one who holds money as agent has no authority to dispose of it in payment of his own debt; that the form of this check was sufficient to put the defendant on inquiry, and that, "in case a person having "notice that money or property is held by another in a fiduciary "capacity, receives it without inquiry from the agent in satis- "faction of his personal debt, the sum or property so received "may be recovered by the true owner unless the agent was "authorized to so dispose of it."

In Williamson vs. Mason, 12 Hun, 97, the cashier of a bank hypothecated securities standing in his name as cashier. It was held that the taker was charged with notice of the facts regarding the use made of them.

In Shaw vs. Spencer, 100 Mass., 382, certificates of stock standing in the name of "Shaw, trustee," were transferred to the defendants by another party as security for his own debt. It was held that this put upon defendants the duty of inquiry and that, in the absence thereof, they acquired no title to the certificates, as they were in fact trust property. This case is cited with approval in National Bank vs. Insurance Company, 104 U. S., 63.

To similar effect is West St. Louis Bank vs. Bank, 95 U. S., 557; Budd vs. Monroe, 18 Hun, 316, approved in Fellows vs. Longyor, 91 N. Y., 331; Sturtevant vs. Jaques, 96 Mass., 523; Gaston vs. Bank, 29 N. J. Eq., 98; Rhodes vs. Webb, 24 Minn., 292; Bodenham vs. Hoskyns, 2 De G., M. & G., 903.

It is therefore clear that the rule of liability was stated to the jury even more favorably to defendants than was warranted by the decisions. For the jury was instructed that defendants were liable only on the ground of bad faith.

THIRD.

The defendants were not entitled to the exclusion from the verdict of the item claimed in that regard; or to credit for the sums paid by them to the Third National Bank.

FIRST. *The defendants were not entitled to the exclusion from the verdict of the item claimed in that regard.*

The defendants requested an instruction that the jury could not find a verdict against them for a certain check of the Albion Bank for $10,000 (p. 91). But it is manifest that this check is similar to all the others, and that the defendants were not entitled to have the same excluded from the verdict.

This check is described as Exhibit No. 15 (p. 91). That exhibit (p. 55) is the check set forth in the ninth cause of action in the complaint (p. 10). That is to say, it is a check dated January 24, 1881,

drawn upon the Third National Bank, signed "A. S. Warner, Cash. First Nat. Bk. of Albion, N. Y.," to the order of Kissam, Whitney & Co., for the sum of ten thousand dollars (p. 10). The answer contains no different allegations with reference thereto from those regarding the other checks (pp. 34, 35). And on the testimony it stands upon no different footing. The testimony is as follows.

The check was endorsed by the defendants and collected by them from the Third National Bank and credited to Warner (pp. 55, 63).

The defendants offered a check for $30,000, dated January 25, 1881, signed by them and drawn to the order of the Bank of New York, being Exhibit E 1 (p. 65).

Upon cross-examination the defendant Washburn said: "The "check of January 25, 1881, marked Ex. E 1, payable to the order "of the Bank of New York, was given by us for a loan of $30,- "000 made by that bank to Warner. We paid that loan by "that check. That loan was made on the 15th of October, 1880, "and the check of $14,000 of October 15th, 1880, which has "just been offered in evidence, was a part of that loan, and "was deposited in the Third National Bank to the credit of "the Albion Bank" (p. 67).

The check dated October 15, 1880, for $14,000, was drawn on the Bank of New York, payable to the Third National Bank, being among the deposits so made which do not appear upon the books of the Albion Bank (pp. 65, 72).

"The checks now shown, drawn by Warner on the Bank of "New York, are one dated October 15th, 1880, for $6,000; the "other two, dated October 30th, 1880, for $8,000, both payable "to the order of the defendants, were received by them from "Warner, and are credited to Warner in his account. These last "two checks are also a part of the loan of $30,000 made by the "Bank of New York, as above mentioned" (p. 67).

Upon re-direct examination the witness stated that he made the check to take up the loan of $30,000 made by the Bank of New York to Warner, and got the securities from that bank, and remitted them to Warner by his direction (pp. 67, 77).

Upon being recalled by plaintiff, the witness produced a statement of Warner's account with the defendants, including the check of January 24, 1881, for $10,000, with a note, saying, "Draft $10,000, January 24, was used in paying loan Bank of New York for $30,000" (p. 76).

Upon re-direct examination the witness said: "The check for "$10,000, January 24, 1881, Plaintiff's Exhibit No. 15, was sent "to us to be used in payment of the loan at the Bank of New "York, which we paid on the 25th day of January, 1881" (p. 77).

There were no dealings between the Albion Bank and the Bank of New York (p. 59).

This is the entire testimony regarding this check. It may be stated briefly as follows: Upon October 15, 1881, Warner borrowed from the Bank of New York $30,000. Of the proceeds he deposited $14,000 in the Third National Bank to the credit of the Albion Bank, but without the knowledge of the latter bank (pp. 65, 76, 72). The remainder of that loan Warner paid to Kissam, Whitney & Co., the defendants (p. 67). On January 24th, 1881, Warner sent to Kissam, Whitney & Co. the cashier's check of the Albion Bank on the Third National Bank for $10,000—being the check now under consideration—to use in taking up the said loan of $30,000 with the Bank of New York. Kissam, Whitney & Co. deposited that $10,000 check to their own credit and gave to the Bank of New York their own check for $30,060 to pay the loan (pp. 55, 76, 77). In other words, the defendants received this cashier's check, deposited and collected it in the same manner as all the others. Then with their own check they paid a loan to Warner, of which, when made, they had themselves had the larger part of the avails.

It is clear that the defendants' action regarding this check was precisely the same as that regarding all the others—they collected it and used it for Warner's benefit in paying his debt. Therefore, no different instruction should have been given to the jury with reference to this check than with reference to the others.

SECOND. The defendants were not entitled to credit for the sums paid by them to the Third National Bank.

In the course of the trial, it appears, "the court, after discussion "by plaintiff's counsel, ruled that the defendants were not entitled "to the benefit of any moneys deposited by them by Warner's "direction, or by other parties by like direction in the Third "National Bank to the credit of the First National Bank of Albion, "or to the benefit of any payments made by the defendants or by "other parties by direction of Warner, to the said Third National "Bank or to Warner for the account of the First National Bank of "Albion" (pp. 78, 79). As this stands it was not a ruling upon any testimony offered but solely upon an abstract question of law.

Manifestly this was merely an expression of opinion and was no ground for an exception.

The defendants, however, requested the court to instruct the jury that,

(1) The defendants are entitled to be credited with the amounts of money which were deposited by them in the Third National Bank to the credit of the Bank of Albion (p. 90).

(2) The defendants were entitled to be credited with such of the amounts so deposited by them in the Third National Bank to the credit of the Bank of Albion, as were entered in the books of the latter bank and thereon debited to the former bank (p. 90).

(3) In case they find a verdict for the plaintiff, it cannot exceed the difference between the accounts between the two banks as contained on their respective books and interest (p. 90).

(4) If the jury find a verdict for the plaintiff it cannot be for any sum in excess of the difference between the checks in suit and the sums paid by the defendant into the Third National Bank and not entered in the books of the Albion Bank (p. 91).

(5) The plaintiff cannot recover any of the checks in suit which have been paid out of moneys deposited in the Third National Bank to the credit of the Albion Bank by Warner or by his direction (p. 91).

The court refused these requests (pp. 90, 91), saying further, " I " have ruled during the course of the trial that the fact that the " defendants paid in under Warner's direction to the Third National " Bank the large sums of money which were paid in is of no mate- " riality as affecting the legal rights of the parties " (p. 94).

The question raised by all these requests is, in brief, whether any amounts paid into the Third National Bank to the credit of the Bank of Albion by Warner, or by the defendants under his instructions, are to be regarded as reducing the damages recoverable from the defendants.

It is settled by abundant authority that where one has taken the property of another damages are not mitigated by showing merely that (1) the wrongdoer returned the property without the consent of the owner or applied it upon the owner's debts. It must appear still further that (2) the owner consented to such action or that the proceeds were so applied under legal process without connivance of the wrongdoer. "A stranger could not take the property of his neighbor, have it " sold under process, and apply the proceeds in discharging the

" debts of his neighbor, and then claim the right to have such pay-
" ments received as a set off, or in mitigation of the damages done
" by the trespass " (McAfee vs. Crofford, 13 How., U. S., 447, 456).

In Hanmer vs. Wilsey, 17 Wend., 91, a horse belonging to plaintiff was converted by defendant. The horse was returned to plaintiff's stable, but plaintiff declined to receive him. He was then seized and sold under valid process against the plaintiff and in favor of defendant. It was claimed both that the return of the horse and the amount realized under the sale and applied on plaintiff's debt were available in mitigation of damages. The court (BRONSON, J.) said that the " actual return of the horse to the plaintiff's " stable, without his assent was a matter of no legal conse-" quence. * * The defendant could not by any act of his " own, without the plaintiff's consent, defeat the action" (p. 93). It held also that the subsequent sale on legal process in favor of defendant and the application of the proceeds upon plaintiff's debt were not available in mitigation. The cause of action became complete by the conversion. " There is, I think, no legal " principle upon which the defendant, by any mere act of his " own, could get rid of the difficulty. * * It was a matter " of no moment to the plaintiff what became of the horse after " the original illegal taking. Replacing the animal in the " plaintiff's stable without his assent was a nugatory act ; it " could no more operate to prejudice the plaintiff than any " other disposition which the defendant might have made of " the property " (p. 94).

In Otis vs. Jones, 21 Wend., 394, property was converted and then sold upon process against the plaintiff and in favor of the wrongdoer. It was argued that by this sale the property had been, in effect, applied to plaintiff's use and, therefore, he ought to recover only nominal damages. The court said (BRONSON, J.), " the answer is that a wrong-" doer cannot discharge himself by any act of his own " without the assent of the injured party. But suppose " there was no tort in the case, and the question arose in an " action of assumpsit. Although by means of the second sale " the sum of $36, for which the property was struck off, may " have been applied to the plaintiff's use, by way of satisfying " so much of his debt, yet as that benefit was conferred without " request, it could create no legal obligation on the part of the " plaintiff to refund, or in any other way account for the money. " (Bartholemew vs. Jackson, 20 Johns, R., 28.) If the defendant " could not in an action recover the value of a benefit thus con-" ferred on the plaintiff, he cannot do the same thing in another " form, as by setting it off or using it by way of satisfaction in " an action brought against him by the plaintiff. If this could " not be done in assumpsit, it surely cannot be allowed in an

" action of trover. By procuring a sale on legal process, the " defendant cannot be better off than he would if he had offered " to restore the property to the plaintiff. And yet no tender " will, at the common law, either bar an action for a tort or take " away the right to full compensation in damages." The same " was held in Wehle vs. Butler, 61 N. Y., 249.

In People vs. Bank, 75 N. Y., 547, 564, it is stated to be the rule that in case of conversion, before the wrongdoer " can " claim a mitigation of the damages for the conversion in con- " sequence of the return of the property, the owner must have " accepted its return or resumed his dominion over it as " owner." And in Roberts vs. Co., 122 N. Y., 57, 67, it is said, that in order to mitigate damages " it must be shown that the " owner had the benefit of (the property) in such a way as " would operate in law as a restoration of the property."

In McMichael vs. Mason, 13 Pa. St., 215, the wrongdoer had applied the proceeds upon a debt of the owner. The court held that this was not available in mitigation, saying, " we have " then the naked case of a voluntary payment of a debt out of " the proceeds of a debtor's property wrongfully converted, but " not at the debtor's special instance and request. Every one " has a right to adjust his own liabilities, and no one has a " right to make another his debtor by intrusion into his affairs." The same thing was held in Carrier vs. Esbaugh, 70 Pa. St., 239.

In Barnard vs. Jennison, 27 Mich., 231, it was held to be no mitigation of damages for conversion that the wrongdoer had applied the proceeds of the property upon a debt of the owner. The court said (COOLEY, J.), " in general, when there is no " fraud and when the law does not forbid, a man may dispose " of his own property according to his own ideas of propriety. " If he is indebted by note to different parties, he may apply " his property to the payment of one and refuse to apply it to " the payment of another, and he may lawfully discriminate in " this way, though in doing so he ignores the stronger moral " claim resting upon him. This results from the supreme do- " minion which is involved in the absolute ownership of prop- " erty. No creditor, without process and without authority or " right, except such as belongs to him as creditor, can dis- " possess his debtor of his goods and then mitigate or defeat a " recovery by showing that the property taken has, without any " assent or concession of the debtor, been applied on the " debt." The same thing is held in Bungard vs. Stillwagen, 41 Mich., 54.

In Edmundson vs. Nuttall, 17 C. B., N. S., 279, the same rules are laid down. They are placed especially upon the ground that a stranger cannot thus lawlessly interfere with the owner's right of dominion over his own property.

To similar effect are Wiggins vs. Whitney, 24 Wend., 379 ;

Livermore vs. Northrup, 44 N. Y., 107; Lyon vs. Yates, 52 Barb., 237; Sprague vs. McKenzie, 63 Barb., 60; East vs. Pace, 57 Ala., 521.

Manifestly these rules are sound. Every debtor has full dominion over his own property with the right to apply it upon his debts in such order as he sees fit. He cannot by the mere act of a wrongdoer be deprived of that right and compelled to make such application as the wrongdoer elects (Wehle vs. Butler, 61 N. Y., 249; Lyon vs. Yates, 52 Barb., 237). Unless, then, the debtor has assented or the application has been made by some legal process which binds him, any application made by the wrongdoer of the proceeds of the property converted is a mere voluntary act which cannot affect the rights of the owner of the property. For the voluntary payment of the debt of another subjects that other to no liability to the person so paying (McAfee vs. Crofford, 13 How., 447, 456; Homestead vs. Railroad, 17 Wall., 153, 167; Otis vs. James, 21 Wend., 394; Ingraham vs. Gilbert, 20 Barb., 151).

It is clear, however, that the present case does not satisfy either of these requirements. The Albion Bank never knew of the misappropriation of these checks. Manifestly it did not consent to any return of their proceeds or to any application thereof upon its own debts by depositing the same in the Third National Bank subject to its drafts. Moreover, in point of fact, there is no proof that the same ever have been so applied.

The answer alleges that the checks in suit were paid out of the sums deposited by the defendants. But the present claim cannot be supported upon that ground (p. 30).

Before drawing the checks now involved Warner had already stolen from this account sums represented by the following checks (p. 71):

March	2, 1880.	Chase & Atkins	$700
"	18, "	J. B. Manning	10,000
April	7, "	Chase & Atkins	5,000
"	19, "	"	5,000
May	8, "	"	14,000
"	13, "	"	5,000
	Total		$39,700

Then between May 13, 1880, and March 25, 1881, he misappro-

priated through the checks now in suit $83,000 (*supra*, 1, 2). Then, in April, 1881, he caused the defendants to deposit in the Third National Bank to the credit of the Albion Bank $22,790 (*supra*, p. 2), which deposits, however, were not entered in the ledger of the Albion Bank (p. 72). Then, in August, 1881, Warner misappropriated through the checks now in suit $20,000 more making $103,000 in all (*supra*, p. 2). No further deposits were made by defendants until April, 1882 (*supra*, p. 2). So that no such deposits were made while the checks now in suit were being drawn until the drawing of them was almost completed, and then only $22,790.

This was a deposit made by Warner generally without specific appropriation to any indebtedness. It was not credited against the checks now in suit—for the Albion Bank knew neither of those checks or of these deposits. It had no connection with the drawing of these checks so far as the respective dates were concerned. Warner was largely indebted to the Albion Bank on other accounts, owing $39,700 by reason of drafts against this very account prior to any of the checks now in suit and ultimately owing the bank $381,000 (p. 70). Even if it were a question of application of payments, the money thus turned in by Warner would be applied upon the first items due from him and, therefore, not upon any of the checks now in suit.

So that the claim that the checks in suit were paid out of any moneys deposited in the Third National Bank by the defendants is not supported by any facts.

The question, then, is whether the mere fact that Warner caused the defendants to deposit $89,202.50 in the Third National Bank to the credit of the Albion Bank constitutes any offset. And it is clear that it does not because this was not done with the assent of that Bank. Under the rules above stated this alone would render the deposit unavailable by way of mitigation. But, in addition, there is no proof that this money was applied to any indebtedness of the Albion Bank.

There were considerable sums deposited in the Third National Bank to the credit of the Albion Bank which do not appear upon the ledger of the latter (*supra*, p. 72), having manifestly been omitted therefrom by Warner's agency so that they might approximately offset the checks which he had drawn against the account for his own purposes. But there is no proof that these sums were not the money of the Albion Bank. It would be the presumption that they were from their being deposited to its credit and mixed with its funds

(National Bank vs. Insurance Co., 104 U. S., 54). And this is rendered certain by the facts that Warner was a person of small means (p. 90), and was freely using the bank's money as he saw fit, and that the character of the items shows that they are in the main collection items and payments made by Warner expressly as president (p. 72). There is, then, no proof that any individual moneys of Warner were ever deposited in this account save the sums paid in under his direction by the defendants as aforesaid, amounting to $89,202.50 *(supra*, p. 2).

Can it be said that these sums were ever applied to any indebtedness of the Albion Bank? There is no proof whatever of the sort. For out of this very account--out of the moneys deposited to the credit of the Albion Bank—Warner drew for his own purposes $253,273.18 (p. 69). It cannot be said that this $89,202.50 which he caused to be turned in was ever used for the purposes of the Albion Bank, in view of the fact that he also drew out $253,273.18—nearly three times as much. So that it is not shown that this money has ever been of the slightest advantage to the Albion Bank. Still further, it may be observed, Warner's entire indebtedness to the bank was $381,000 (p. 70). The utmost effect of the facts upon which defendants rely is that upon his indebtedness should be credited this sum of $89,-202.50. But there is no reason why it should be credited upon that part of the indebtedness arising from these checks. Warner made no such application and the plaintiff has elected to apply it otherwise. So that this does not extinguish any claim upon the checks.

These considerations dispose of any claim by the defendants to mitigate the damages by reason of the payment of this sum to the Third National Bank. The Albion Bank did not consent to any such payments and, therefore, the same would not be available against it by way of mitigation (*supra* p. 15). It was not a payment of the proceeds of the checks, but merely an independent payment, and the sum paid is not shown to have gone to any purpose of the Albion Bank, but to have been stolen by Warner.

But more than this, the defendants paid no money of their own to the Albion Bankor for its account. They had no dealings with that bank—they did not pay out anything on account of any liability thereof. They paid out the money which they owed to Warner under his direction (p. 74), and for his account. In legal effect they

did nothing but make payment to him. In case they had paid the same money to Warner, and he had turned it in to the Third National Bank, obviously their payment to Warner would have been no discharge of their liability—it would not have mitigated the damages. This was exactly what was done except that the payment was made under Warner's direction, instead of going through his hands. But manifestly that would not vary the legal effect.

The jury has found that the defendants knew that Warner, by these checks, was taking the money of the Albion Bank from the Third National Bank to use for his own purposes. Can it be seriously claimed that they could discharge themselves from liability for the money of the Albion Bank which they had received merely by making payments under Warner's direction into the Third National Bank, from which they knew that he was constantly stealing, and from which he did steal three times the amount thus paid in? Can that be regarded as a payment for the benefit of the Albion Bank?

There were some of the payments made by the defendants under Warner's direction to the Third National Bank which were charged to that bank upon the ledger account of the Albion Bank. The total amount of these payments was $25,850, and they were made between April 17 and December 31, 1883, about two years after the last of checks now in suit was drawn (*supra*, p. 2). It has been already shown that these payments were not upon account of any of the checks now in suit, and were covered by Warner's other thefts.

Does the fact that these payments were charged on the ledger of the Albion Bank to the Third National Bank make them available to defendants as an offset? It is impossible to see how any such result can follow. The payment in was by Warner's direction and was really made by him. It was much less than was due from him on other accounts. The defendants did not make it on account of any liability of their own to the Albion Bank; the Albion Bank did not accept it on account of any liability of the defendants or on account of these checks of which, indeed, the Albion Bank knew nothing. It was merely a payment in of Warner's money. What difference could it make where he got it? So that with reference to these payments it is equally the fact that the defendants did not pay the money on account of any liability from themselves to the Albion Bank; that bank did not receive the money with knowledge

that it was paid on account of any liability of defendants, and, in view of the amount of Warner's thefts, it does not appear that the money actually went to the benefit of the Albion Bank. So that it is wholly unavailable as an offset.

Moreover, as has been said, the facts show that the sums upon which is based the defendants' claim in this regard were deposited quite independently of any liability upon the checks, and all of them save $22,790 long after that entire liability had come into existence. They were not deposited or received in payment of that liability, but were wholly independent transactions.

If, then, these facts have any legal force, it can be only by way of counterclaim. Therefore they are not available in this action; both because there is no counterclaim pleaded and also because, as the action is in tort, no counterclaim on contract is admissible (Smith vs. Hall, 67 N. Y., 48). These are elementary rules, and are fatal to the claim now made. Especially is this the case as the requests for instructions covered all the deposits indiscriminately. As the deposits made long after the last check was drawn could not be available, and the requests covered all the deposits, they were in any event too broad, and were therefore erroneous.

CONCLUSION.

The judgment should be affirmed.

Under elementary rules there is nothing in the suggestion that a demand was necessary before suit. The amount of interest, if any, was a mere matter of computation. There was, therefore, no error in submitting that question to the jury, whether this be regarded as an action on contract or in tort (Mechanics Bank vs. Bank, 60 N. Y., 40; Duryea vs. Mayor, 96 N. Y., 477, 499; Mansfield vs. Co., 111 N. Y., 331).

Reference may be made to the principal brief of Mr. Wingate for a fuller discussion of the questions in the case.

As there is no error, the judgment should be affirmed.

B. H. Bristow,
Of Counsel for Defendant in Error.

141-446
13 Orig.

IN THE

SUPREME COURT OF THE UNITED STATES.

Ex parte,

JOHN O. SHAW, JR., Trustee,

Petitioner.

PETITION FOR WRIT OF MANDAMUS AND MOTION THEREFOR.

MICHAEL H. CARDOZO,

Of Counsel for Petitioner.

PRESS OF CLARENCE S. NATHAN, 202 FULTON ST., N. Y.

IN THE

Supreme Court of the United States.

Ex-Parte,

JOHN O SHAW, JR., *Trustee,*

Petitioner.

The above-named Petitioner, John O. Shaw, Jr., Trustee, moves the Honorable, the Judges of the Supreme Court of the United States, for a rule on the Judges of the Circuit Court of the United States for the Southern District of New York, to show cause why a writ of mandamus should not be issued commanding the Judges of said Court to take jurisdiction and proceed against the Quincy Mining Company in the suit now pending, ~~at issue~~ and undetermined in said Circuit Court of the United States for the Southern District of New York, wherein John O. Shaw, Jr., Trustee, the Petitioner herein, is complainant, and the said Quincy Mining Company and others are defendants, upon the ground that said Quincy Mining Company was an inhabitant of the State of New York and a resident in the Southern District of New York at the time of the commencement of said suit, and why the order made in said suit on and bearing date the 23rd day of December, 1891, whereby the service of the writ of subpœna upon said Quincy

Mining Company was set aside, should not be stricken from the record of said suit and thereupon to make such disposition of said suit as ought to have been made had the said order not been made and entered therein, and why the said Petitioner should not have such other and further relief in the premises as may be just.

Washington, D. C., January 11, 1892.

MICHAEL H. CARDOZO,
Of Counsel.

To the Judges of the Supreme Court of the United States:

The petition of John O. Shaw, Jr., Trustee, respectfully shows:

I. That heretofore and on or about the 3d day of September, 1891, a suit was commenced by him against the Quincy Mining Company, Thomas F. Mason, Thomas H. Mason and William Hart Smith, in the Circuit Court of the United States, for the Southern District of New York, and said suit is now pending, at issue and undetermined.

II. That hereto annexed and marked "Exhibit A," is a copy, duly certified by the clerk of said Circuit Court of the United States, for the Southern District of New York, of all the papers filed in said suit to which your petitioner begs leave to refer, and hereby makes the same a part of this, his petition.

III. That the subpœna in said suit was duly served upon the defendant, the Quincy Mining Company, by the United States Marshal for the Southern District of New York, at the City of New York, in said district, on or about the 4th day of September, 1891, and said supœna has also been served upon the individual defendants in said suit, as appears from the return of the marshal, marked "Schedule A," in said "Exhibit A."

IV. That it appears from said "Exhibit A" that all of said defendants entered a general appearance in said suit by Messrs. Fullerton & Rushmore, their solicitors, on the 5th day of October, 1891, by filing a general notice of appearance with the clerk of said Circuit Court on said day.

V. That it appears from said "Exhibit A" that your Petitioner is and was at the commencement of said suit a citizen and resident of the State of Masschusetts, and all of the individual defendants in said suit are and were at the commencement of said suit citizens of the State of New York, and residents of the City of New York, in the Southern District of New York.

VI. That it appears from said "Exhibit A" that the defendant, the Quincy Mining Company, is and was at the time of the commencement of said suit a corporation organized under the laws of the State of Michigan, pursuant to an act of the Legislature of said State, approved May 11th, 1877, and section 30 of said Act expressly provides as follows:

"It shall be lawful for any company associating under this act to provide in the articles of association for having the business office of such company out of this State, and to hold any meeting of the stockholders or Board of Directors of such company at such office so provided for, but every such company having its business office out of this State shall have an office for the transaction of business within this State, to be also designated in such articles of association."

That the fifth article of the said articles of association of said defendant, the Quincy Mining Company, marked "Schedule C," in said "Exhibit A," provide as follows:

"The business office of the company hereby constituted and formed shall be in the City, County and State of New York, and another business office is hereby established at the Quincy Mine, in the County of Houghton, State of Michigan."

VII. That it appears from said "Exhibit A" that beginning in the year 1878, and at all times thereafter, and at the time of the commencement of said suit the said defendant, the Quincy Mining Company, had its principal and general office for the transaction of its business in the City of New York,

in the County and State of New York, in the Southern District of New York, and had no other office, except at the mines of the company in Michigan, which latter office was and is used solely for the purpose of carrying on the business attendant upon the local workings of the mines of said company.

VIII. That it appears from said "Exhibit A" that the dirctors of said defendant, the Quincy Mining Company, are five in number, and they have always had their meetings in the said City of New York, and all of the reports made by the President of said Company to said Board of Directors are dated at the City of New York.

That William R. Todd, the Secretary of said Company, has been such since the 6th day of March, 1878, and has always had, and had at the time of the commencement of said suit, charge of the general office of said Company in the State of New York at No. 52 Broadway, in the said City of New York, and said Todd has likewise during all of said years filled the office of Treasurer of said Company, and that the only other officer of said Company, at the time of the commencement of this action, was the defendant, Thomas F. Mason, who was the President thereof.

IX. That it appears from said Exhibit A that after the commencement of said suit and after said defendants had all appeared therein, as aforesaid, by Messrs. Fullerton & Rushmore as their solicitors, the said defendant, the Quincy Mining Company, moved in said Circuit Court for an order permitting it to withdraw the general appearance which it had entered in said action, and for leave to enter a special appearance therein, and moved to set aside the service of the subpœna upon it, upon the ground that it was not an inhabitant of the

State of New York at the time of the commencement of said action, within the meaning of the Act of Congress of March 3, 1875, as amended in 1887 and 1888.

X. That it appears from said "Exhibit A" that said motion thereupon duly came on to be heard before the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States, for the Southern District of New York, and after hearing said motion said Judge made an order allowing said defendant, the Quincy Mining Company, to amend itsd sai general notice of appearance by making a special one, and set aside the service of the subpœna in said action upon said defendant, the Quincy Mining Company, upon the ground that it was not an inhabitant of the State of New York, and resident of the Southern District of New York at the time of the commencement of this action, and that a certified copy of said order is contained in said "Exhibit A."

XI. Your Petitioner alleges that although said Quincy Mining Company was organized under the laws of the State of Michigan, it became, by reason of the facts and circumstances herein set forth, an inhabitant of the State of New York and a resident of the City of New York in the Southern District of New York, all of which appeared before said Circuit Court upon the hearing of said motion, as shown by the papers contained in said "Exhibit A."

XII. Your petitioner further alleges that by the said order he is prevented from exercising his right to sue the said Quincy Mining Company, in the manner he is advised that he is entitled to do by the Act of Congress, of March 3, 1875, as amended in 1887 and 1888, that is to say, in the district in which the defendant, the Quincy Mining Company, had become an inhabitant and resident at the time of

the service of said writ of subpœna; and your Petitioner further alleges that he is without any adequate remedy to compel the said Circuit Court to exercise the said jurisdiction inasmuch as the said order setting aside the service of the said writ of subpœna is not a judgment from which an appeal lies.

WHEREFORE, your Petitioner prays that this Honorable Court will issue a writ of mandamus commanding the Judges of said Circuit Court to take jurisdiction and proceed against the Quincy Mining Company in the suit now pending, at issue and undetermined in the said Circuit Court of the United States for the Southern District of New York, wherein your Petitioner, John O. Shaw, Jr., Trustee, is complainant, and the said Quincy Mining Company and others are defendants, and to strike from the record the order made in said suit on and bearing date the 23rd day of December, 1891, whereby the service of said writ of subpœna upon the said Quincy Mining Company was set aside, be stricken from the record of said suit, and thereupon to make such disposition of said suit as ought to have been made had the said order not been made and entered therein, and will grant to your Petitioner such other or further relief, or both, in the premises, as may be just.

And your Petitioner will ever pray, etc.

Dated, January 7th, 1891.

JOHN O. SHAW, JR.,
Trustee.

MICHAEL H. CARDOZO,
Of Counsel.

STATE OF MASSACHUSETTS,
COUNTY OF SUFFOLK, } *ss.*
CITY OF BOSTON.

John O. Shaw, Junior, being duly sworn, says that he is the Petitioner in the foregoing petition named; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge.

JOHN O. SHAW, JR.,
Trustee.

Sworn to before me this
7th day of January, 1892.

GEORGE LEMIST CLARKE,
Notary Public.

SEAL.

At a Session of the Circuit Court of the United States for the Southern District of New York, sitting in Equity, held at the Court Room in the City of New York, on Wednesday, the twenty-third day of December, A. D. 1891.

Present—The Hon. E. Henry Lacombe,
Circuit Judge.

John O. Shaw, Jr., Trusteee,

vs

The Quincy Mining Company, Impleaded with Thomas F. Mason, Thomas Henry Mason and William Hart Smith.

The motion of the defendant, the Quincy Mining Company, a corporation of Michigan, for leave to convert its appearance, inadvertently entered, into a special appearance for the sole purpose of this motion, and also to set aside the service of papers upon the Company by serving subpœna on William R. Todd, Secretary of the Company, in New York, having been heretofore argued by Mr. William Fullerton and Mr. Alfred Russell for the Company, and Mr. Cardozo opposed, and due deliberation having been had :

It is now by the Court here ordered and adjudged that said motion be and the same hereby is granted, and leave is given said Company to amend its appearance *nunc pro tunc*, so as to be made a special for this motion, instead of general. And it is further ordered and adjudged that the service of process in this case upon the Quincy Mining Company by

service of subpœna in the City of New York upon William R. Todd, Secretary and Treasurer of said Company be and the same is hereby set aside.

E. HENRY LACOMBE.

(Endorsed): United states Circuit Court, Southern District of N. Y.—In Equity.—John O. Shaw, Jr., Trustee, *vs.* the Quincy Mining Company, impleaded with Thomas F. Mason, Thomas Henry Mason and William Hart Smith. Order—William Fullerton, Alfred Russell, Solicitors for Deft. Quincy Mining Co. U. S Circuit Court. Filed Dec. 23, 1891. John A. Shields, Clerk.

The appearance my be amended *nunc pro tunc* so as to be made special for this motion instead of general. And motion to set aside service of process on the Mining Company is granted.

Dec. 16, 1891.

E. H. LACOMBE.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN O. SHAW, JR., *Trustee*,

vs.

THE QUINCY MINING COMPANY, THOMAS F. MASON, THOMAS H. MASON AND WILLIAM HART SMITH.

And now comes the Quincy Mining Company, which is a corporation created and existing under the laws of the State of Michigan, and which has its principal business office in the village of Hancock in said State, and which corporation is a citizen of the State of Michigan, and appears by William Fullerton solely for the purpose of making this motion and moves the Court, upon the affidavit of William Fullerton, for leave to withdraw the appearance of said corporation, heretofore entered by William Fullerton, this motion for leave to withdraw being based upon the affidavit of William Fullerton, herewith filed, and upon the ground that said appearance was entered inadvertently and without actual authority from said corporation to appear, and under the circumstances set forth in said affidavit and being based also upon the affidavit of William R. Todd, Secretary of said corporation, herewith filed, showing that the said corporation did not intend to appear and to waive its personal exemptions under the act of Congress of 1887 from being sued in the district where it resides. Said corporation also moves the Court to set aside the service of the sub pœna in this cause upon the Quincy Mining Company, defendant, (by serving the same on Wm. R. Todd, Secretary), upon the ground shown by the

above affidavit, and appearing upon the face of the bill, that said defendant resides in the State and Western District of Michigan, and is not subject to be sued in this Court under the act of Congress of 1887, March 3.

WILLIAM FULLERTON.

ALFRED RUSSELL,
Of Counsel on motion.

On reading and filing the within motion and affidavit in support of it and on hearing Mr. Fullerton and Mr. Russell for the motion, it is—

Ordered that Messrs. Billings & Cardozo, solicitors for the plaintiff, being served with a copy of the motion and affidavits, show cause before this Court on Friday, November 27th, 1891, at the opening of Court on that day, in the forenoon, or as soon thereafter as counsel can be heard, why said motion should not be granted and the service of process on the Quincy Mining Company be set aside. And it is further—

Ordered that all proceedings in this action be stayed in the meantime, and that the time for all of the defendants herein to plead, answer or demur be, and hereby is, extended ten days after the hearing and decision of said motion.

Dated City Hall, November 19th, 1891.

E. HENRY LACOMBE,
Circuit Judge.

Endorsed: U. S. Circuit Court, So. District of N. Y. John O. Shaw, Jr., Tr. *vs.* The Quincy Mining Company, Impleaded, etc. In motion for leave to withdraw appearance and to set aside service of process on the Q. M. Co. Wm. Fullerton, Sol. on motion. Alfred Russell, of Counsel, U. S. Circuit Court. Filed Dec. 16, 1891; John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN O. SHAW, *Trustee*,

vs.

THE QUINCY MINING COMPANY, THOMAS F. MASON, THOMAS H. MASON AND WILLIAM HART SMITH.

Southern District of New York, *ss.*

William Fullerton, being duly sworn, says:

First. That Don M. Dickerson is the attorney, resident in Michigan, of the said defendant, the Quincy Mining Company, which is a corporation under the laws of said State, engaged in mining copper, at Hancock, in said State, and having its business office at Hancock, in said State.

Second. That said Dickerson advised said corporation that under the law of 1887 of the Congress, this suit could not be maintained in this Court against said corporation, because it is a citizen of Michigan, there residing.

Third. That it was arranged that said Dickerson should come to the City of New York to consult with this deponent in regard to this suit, and that this arrangement was made immediately after the suit was begun, but that said Dickerson was taken ill in Detroit, his residence, and subsequently, intending to come to New York from Washington, was again taken ill there, and has been prevented from coming to New York to present the motion to put aside the service.

Fourth. That meantime, this deponent, inadvertently, and without any authority, except as hereinafter stated, whatsoever from said corporation to enter its appearance, and get copy of bill, did so, under the following circumstances:

William Todd, the Secretary of the Quincy Mining Company, handed this deponent the summons which had then been served on him, saying he did not understand the matters. This deponent then suggested that he give notice of appearance as solicitor of said company, so that a copy of the bill in the action could be obtained, and said notice of appearance was given under such circumstances. I then enquired of said Todd, who theretofore acted as counsel for the said Mining Company in the State of Michigan, and upon being informed that the Hon. Don M. Dickerson was such counsel, this deponent then requested that he have an immediate interview with him. This was promised, and I was soon after informed that said Dickerson had been telegraphed for, and would come directly to this city for consultation. I was afterwards further informed that said Dickerson was ill, and could not keep his promise. I have also been informed that said Dickerson has continued seriously ill, and this deponent has been deprived of the benefit of his counsel. In consequence of his illness, the Hon. Alfred Russell, of Detroit, was requested by telegraph yesterday to come to the City of New York for the purpose of holding a consultation with this deponent in regard to the above action; that said Russell arrived this morning in the City of New York, and this deponent for the first time has had the benefit of his advice.

Sworn before me this 19th day of November, 1891.

[Signed] WILLIAM FULLERTON.

[Signed] AMELIA WEYL,
Notary Public,
New York County.

[Endorsed:]
U. S. Circuit Court, Southern District of N. Y. Jno. O. Shaw, Jr., Tr., *vs.* Quincy Ming. Co., etc., Affidavit of Wm. Fullerton, on motion U. S. Circuit Court. Filed Dec. 16, John A. Shields, Clerk.
Wm. Fullerton, Sol., Alfred Russell, Counsel.

CIRCUIT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

J. O. SHAW, *Trustee*,
v.
THE QUINCY MINING COMPANY, THOMAS F. MASON, THOMAS H. MASON AND WILLIAM HART SMITH.

Southern District of New York, *ss.*

William R. Todd, being duly sworn, deposes and says:

1. That he is and for a long time has been Secretary of the Quincy Mining Company, and has charge of its books and correspondence.

2. That said corporation did not authorize William Fullerton, Esq., to enter its appearance in this suit except so far as appears in his affidavit, and did not intend to waive its exemption from suit in any other District except that of Western Michigan, where it resides.

3. That said corporation, upon the service of th subpœna in this cause, running to the corporation (which service was made upon this deponent) was advised by the attorney of this corporation, residing in Michigan, Hon. Don M. Dickinson (late Postmaster General) that the service would be set aside on motion upon the ground the Corporation, under the Act of 1887, was exempted from suit in this Court, and that said Corporation arranged to have said Dickinson come to New York to see after making said motion; but he was prevented from doing so by illness.

4. That said Dickinson telegraphed as follows (as soon as his illness allowed) October 23, 1891: "Tell Judge F., (meaning Judge William Fullerton) that they can get no jurisdiction of the Quincy in New York. Do not appear or waive the point."

And that, as above stated, said Corporation had no intention of waiving its exemption or of consenting to be sued in this Court.

Further, deponent says not.

(Signed) Wm. R. Todd.

Sworn and subscribed before me this nineteenth day of November, A. D. 1891.

(Signed) Amelia Weyl,
Notary Public,
New York County.

[Endorsed:]

U. S. Circuit Court, Southern District of N. Y. John O. Shaw, Tr., *v.* Quincy M. Co. *et al.* Affidavit of Wm. R. Todd, on motion for Co. U. S. Circuit Court. Filed Dec. 16, 1891, John A. Shields, Clerk.

Wm. Fullerton, Sol. Alfred Russell, of Counsel.

CIRCUIT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN O. SHAW, JUNIOR, *Trustee*, *against* THE QUINCY MINING COMPANY, THOMAS F. MASON, THOMAS H. MASON AND WILLIAM HART SMITH.	In Equity.

SOUTHERN DISTRICT OF NEW YORK, *ss.*:

MICHAEL H. CARDOZO, being duly sworn, says that he is one of the attorneys, and of counsel for the complainant in the above entitled action.

That this action was commenced on or about the 3rd day of September, 1891, by the service of a subpœna upon the defendant, the Quincy Mining Company, by the United States Marshal, for the Southern District of New York, and that the individual defendants have also been served with said subpœna by said Marshal. That hereto annexed and marked Schedule A, is a true and correct copy of the return of said Marshal, endorsed upon said subpœna.

That all of said defendants entered an appearance in this action by Messrs. Fullerton & Rushmore, their attorneys, on the 5th day of October, 1891, and that hereto annexed and marked Schedule B, is a copy of the appearance filed by said attorneys with the Clerk of this Court, on said 5th day of October, 1891

That prior to the first Monday of November, 1891, and after said defendants had entered their appearance herein, the attorneys for said defendants applied to deponent for an extension of time to answer herein, and deponent consented in writing that their time to answer be extended to and including the 16th day of November, 1891.

That on the said 16th day of November, 1891, a representative from the office of said defendants' attorneys called upon deponent and asked for a further extension of time in which to answer, and deponent thereupon stated that he would give no further written extension of time to answer, but if said defendants' attorneys would file and serve their said answer on or before Friday, November 20th, 1891, deponent would consent that their time might be extended to and including that day.

Thereupon said representative of defendants' attorneys stated to deponent that if deponent did not hear from him to the contrary, immediately upon his return to the office of defendants' attorneys, that said defendants' attorneys would accept said verbal stipulation, and it was then distinctly understood and agreed that if they would not accept such stipulation, they would on that day notify deponent, and they would then apply to the Court for an order extending their time to answer; but that deponent heard nothing upon said day, or at any time thereafter, from said defendants' attorneys, until served with the order to show cause, which was made herein by the Hon. E. Henry Lacombe, on the 19th day of November, 1891.

That at neither of the interviews which deponent had with the representative of said defendants' attorneys, was it ever suggested that the said attorneys had not full and absolute authority to enter the

general appearance, which they did enter in this action.

Deponent further says that he is informed and believes that the defendant, the Quincy Mining Company, is a corporation existing under the laws of the State of Michigan, and annexes hereto, and makes the same a part of this affidavit, marking the same Schedule C, a certified copy of said articles of association, it being expressly provided in and by the fifth article thereof as follows: "The business office "of the company hereby constituted and formed, "shall be in the City, County and State of New "York, and another business office is hereby estab- "lished at the Quincy Mine, in the County of "Houghton, in the State of Michigan." And that, as deponent is informed and believes, and his knowledge and information in this respect are derived from an examination of the reports of the Quincy Mining Company, beginning back in the year 1878, that said Company has always had its principal and general office for the transaction of its business in the City of New York, in the County and State of New York, and has had no other office except at the mines of the Company in Michigan, which, as deponent is also informed and believes, and his information and belief are derived from an examination of said reports, has been solely for the purpose of carrying on the business attendant upon the local working of the mines of said Company, and deponent annexes hereto, as Schedule D, a printed copy of the report of the Quincy Mining Company for the year 1887, which purports to have been printed in said City of New York in the year 1888.

Deponent further says that, as he is informed and believes, and his information and belief in this regard are derived from an examination of the said

reports of said Company, that the Directors thereof, five in number, have always had their meetings in the City of New York, and that all the reports made by the President of said Company to the said Board of Directors are dated at the said City of New York.

Deponent further says that he hereto annexes and marks Schedule E, a certified copy of a certificate, executed and filed by said Company in the office of the Secretary of State of Michigan, on or about the 14th day of June, 1889, and that both said certificate and the said certificate of incorporation were all executed by the persons whose names are signed thereto at the City of New York.

Deponent further says that he is informed that the said William R. Todd, whose affidavit is submitted on behalf of the defendant, the Quincy Mining Company, on this motion, verified herein the 19th day of November, 1891, has been the Secretary of said Mining Company for many years, to wit: ever since the 6th day of March, 1878, and has during all said years been entirely familiar with the Act under which said Mining Company was organized, and well knew of all its concerns and affairs at the time he instructed William Fullerton to appear in behalf of the Company in this action.

And deponent further says that, as he is informed and believes, at the time of the commencement of this action, the said Quincy Mining Company continued to have the only general office which it had in any State, for the transaction of business, at No. 52 Broadway, in the City of New York, which was also the office of its Secretary, the said William R. Todd, above referred to, and that it has had and maintained its said general office at the said place for many years prior to the commencement of this action.

That on the 29th day of October, 1891, deponent's firm received a letter from Messrs. Fullerton & Rushmore, defendants' attorneys herein, requesting the consent of deponent's firm to examine one Edwin Rice, of No. 15 Saratoga Street, East Boston, Massachusetts, *de bene esse*, upon the ground that he was ill, and that within a few days thereafter, deponent informed defendants' attorneys that as soon as their answer was served herein, he would consent to examine said witness as requested by said defendants' attorneys.

That deponent has examined the act of the Legislature of the State of Michigan, approved May 11th, 1877, being the act under which the defendant, the Quincy Mining Company is formed, and referred to in its certificate of incorporation hereto annexed, and that Section 30 of said act, expressly provides as follows:

"It shall be lawful for any company associating under this "act to provide in the articles of association for having the "business office of such company out of this State, and to "hold any meeting of the Stockholders or Board of Directors "of such company at such office so provided for, but every "such company having its business office out of this State, "shall have an office for the transaction of business within "this State, to be also designated in such articles of association."'

MICHAEL H. CARDOZO.

Sworn to before me this
4th day of December, 1891,

[Seal.] EDGAR J. NATHAN,
Notary Public.
N. Y. Co.

Schedule A.

[L. S.]

THE PRESIDENT OF THE UNITED STATES OF AMERICA, to the Quincy Mining Company, Thomas F. Mason, Thomas H. Mason, William Hart Smith.

Greeting:

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in equity, on the first Monday of October, A. D., 1891, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by John O. Shaw, Jr., Trustee, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New York, on the 3rd day of September, in the year one thousand eight hundred and ninety-one, and of the Independence of the United States of America, the one hundred and sixteenth.

JOHN A. SHIELDS,
Clerk.

FRANK E. BLACKWELL,
Complainant's Solicitor.

The defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of October, 1891, or the bill will be taken *pro confesso,* against them.

J. A. S.,
Clerk.

Endorsed on back :

I hereby certify, That on the 4th day of September, 1891, at the City of New York, in my District, I personally served the within subpœna upon the within named, The Quincy Mining Company, by exhibiting to William Rogers Todd, Secretary of said Company, the within original, and at the same time leaving with him a copy thereof.

I hereby certify, That on the 4th day of September, 1891, at the City of New York, in my District, I personally served the within subpœna upon the within named Thomas F. Mason and William Hart Smith, by exhibiting to them the within original, and at the same time leaving with each of them a copy thereof.

JOHN W. JACOBUS,
United States Marshal,
Southern District of New York.

Dated Sept. 8, 1891.

I hereby certify that on the 10th day of September, 1891, at the City of New York, in my District, I personally served the within subpœna upon the within named Thomas H. Mason, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

JOHN W. JACOBUS.
United States Marshal.
Southern District of New York.

Dated, September 10th, 1891.
C. H. J.

U. S. Circuit Court, Filed Sept. 10, 1891.
John A. Shields,
Clerk.

Schedule B.

CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

JOHN O. SHAW, JUNIOR, *Trustee*, *against* THE QUINCY MINING COMPANY THOMAS F. MASON AND WILLIAM HART SMITH.	In Equity

To the Clerk of the U. S. Circuit Court, Southern District of New York:

Please take notice that we appear as solicitors for the defendants in the above entitled action.

FULLERTON & RUSHMORE,
39 Wall St.,
Oct. 5, 1891. New York City.

Schedule E.

STATE OF MICHIGAN, } ss.
OFFICE OF THE SECRETARY OF STATE. }

I, DANIEL E. SOPER, Secretary of State of the State of Michigan, Do HEREBY CERTIFY, that I have compared the annexed copy of Articles of Association of Quincy Mining Company, with the original articles filed in this office March 15, 1878, and that it is a true and correct transcript therefrom, and of the whole of such original.

[Seal] IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Michigan, at Lansing, this 25th day of November, in the year of our Lord one thousand eight hundred and ninety-one.

SEAL.

DANIEL E. SOPER,
Secretary of State.

ARTICLES OF ASSOCIATION OF THE QUINCY MINING COMPANY.

To all to whom these presents may come, greeting:

Whereas, At a meeting of the stockholders of the Quincy Mining Company (incorporated by act of the Legislature of the State of Michigan, approved March 30th, 1848), duly notified, and held at the office of said Company in the City of New York, on the 6th day of March, 1878, fifteen thousand and twenty-eight shares, being a majority of shares of the capital stock of said Company, being represented at said meeting in person and by proxy, it was unanimously

Resolved, To dissolve its organization and to organize a new Company, by name of "Quincy Mining Company," with a capital of one million ($1,000,000) of dollars, to be divided into forty thousand (40,0000) shares of twenty-five ($25) dollars each, under and by virtue of an act entitled "An act to revise the laws providing for the incorporation of Companies for mining, smelting or manufacturing iron, copper, silver, mineral coal and other ores, or minerals, and to fix the duties and liabilities of such corporations," approved May 11th, 1877, which provides that the property, effects and rights of action of the corporation dissolved shall pass to and be vested in the corporation so organized, and the debts, liabilities and demands existing against the corporation so dissolved shall be and remain debts,

liabilities and demands against the corporation so organized.

Whereas, the undersigned, constituting a majority of the Board of Directors of said original company were by said meeting appointed a committee to act as incorporators on behalf of the stockholders of same, and as such to prepare and execute in legal form the necessary articles of association for reorganizing said company under the act aforesaid, the stock of said new company to be distributed pro-rata among the stockholders of said original company.

Now, therefore, we, Thomas F. Mason and F. B. Wallace, of the City of New York, and T. Henry Perkins and John Brown, of the City of Boston, and State of Massachusetts, being a majority of the Board of Directors of the Quincy Mining Company, have associated and do hereby associate ourselves together for the purpose of forming a mining company, for mining in the Upper Peninsula of the State of Michigan, and organizing the same as a body corporate and politic by virtue and under the provisions of said act approved May 11th, 1877, and in pursuance of such design, we do hereby agree upon, enter into, adopt and establish the following:

Articles of Association.

Article 1.

The name or title of said corporation shall be "Quincy Mining Company," and the same is constituted and formed with intent to reorganize said original company in manner aforesaid, and for the purpose of engaging in and carrying on any kind of mining business, or for refining, smelting or manufacturing any and all kinds of ores, minerals or

metals or for both mining, refining, smelting and manufacturing any or all such ores, minerals or metals in the Upper Peninsula of Michigan.

Article 2.

The capital stock of the company hereby constituted and formed shall be one million ($1,000,000) of dollars, divided into forty thousand (40,000) shares of twenty-five ($25) dollars each. As the mines, property and effects of said original company which pass to and become vested in this company have a cash valuation of one million ($1,000,000) of dollars over all liabilities (which sum is herein estimated to be the true value of the mines, property and effects belonging to the same), the said capital stock of this company is hereby declared to be actually paid in full.

Article 3.

The amount actually paid in on the capital stock of said original company is two hundred thousand ($200,000) dollars, and the cash value of other property, real and personal, belonging to the said original company, which passes to and becomes vested in the company hereby formed is eight hundred thousand ($800,000) dollars.

Article 4.

The names of the stockholders of this company, their respective places of residence and number of shares held by each are as follows, viz.:

Thomas F. Mason,	New York City,	10,000 shares.
F. B. Wallace,	" " "	10,000 "
T. Henry Perkins,	Boston, Mass.,	10,000 "
John Brown,	" "	10,000 "

Being the whole number of forty thousand (40,000) shares, which stock they subscribed in trust to be

distributed pro rata in conformity to vote aforesaid, and to the provisions of the act aforesaid.

Article 5.

The business office of the Company hereby constituted and formed shall be in the City, County and State of New York, and another business office is hereby established at the Quincy Mine, in the County of Houghton and State of Michigan.

Article 6.

The mining operations of the Company are to be conducted and carried on in the County of Houghton in the State of Michigan.

Article 7.

The Board of Directors of said company shall consist of five members. The Directors for the first year shall be: Thomas F. Mason, F. B. Wallace, T. Henry Perkins, John Brown, A. J. Corey, of Michigan.

Article 8.

The term of the corporate existence of said Company shall be thirty (30) years from the date of these presents.

In witness whereof we have hereunto subscribed our names and affixed our respective seals in the City of New York this 6th day of March in the year of our Lord, one thousand eight hundred and seventy-eight.

Thos. F. Mason,	Subscriber for 10,000 shares.
F. B. Wallace,	Subscriber for 10,000 shares.
T. Henry Perkins,	Subscriber for 10,000 shares.
John Brown,	Subscriber for 10,000 shares.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } *ss.*

On this 6th day of March, A. D. 1878, before me, Charles Nettleton, a Commissioner of Deeds for the State of Michigan, personally appeared the within named Thomas F. Mason, F. B. Wallace, T. Henry Perkins, John Brown, known to me to be the persons described in and who executed the foregoing instrument, and acknowledged the same to be their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal this 6th day of March, A. D. 1878.

CHARLES NETTLELON,
Commissioner for Michigan in New York,
[SEAL] 117 Broadway, N. Y. City.

Schedule D.

[Endorsed on Cover:]

Report of the Quincy Mining Company for the year 1887.

Report of the Directors to the Stockholders of the Quincy Mining Company for the year 1887. New York: John J. Bloomfield, printer, 70 Chambers Street, 1888.

Quincy Mining Company, incorporated by special charter of the State of Michigan, March 30, 1848. Reorganized under the Mining Law of the State of Michigan, March 6, 1878. Capital stock, one million dollars, in forty thousand shares of twenty-five dollars each. Officers, President, Thomas F. Mason. Directors, Thomas F. Mason, Morris H. Smith, John Brown, Edwin Rice, Samuel B. Harris, of Michigan. Secretary and Treasurer, William Rogers Todd. Office: No. 52 Broadway,

room 70, New York. Transfer Agent, Nathan H. Daniels, Office: No. 35 Congress Street, room 31, Boston.

REPORT.

The Directors submit the following report of the business of the mine for the past year, and statement of the financial condition of the company.

The product of the mine as prepared for shipment was 6,743,510 pounds, or 3,371$\frac{15}{20}$ tons of mineral, yielding about 83$\frac{1}{100}$ per cent., or 5,609,762 pounds of refined copper, for which has been realized the gross sum of $658,382 94

Realized from sale of silver, . . 3,772 12

$662,155 06

The expenses of the year are as follows:

Running expenses at mine,	$345,246 34	
Building construction, and real estate account, .	75,586 73	
Smelting, transportation and all other expenses, .	93,631 12	
		484,464 19
Leaving as mining profit, . .		$177,690 87
There has also been realized during the year, from interest on loans, . .		10,037 42
Making the income of the year, . .		$187,728 29

The statement of assets and liabilities in our last report showed a balance on hand, as of date,

January 1, 1887, ...		$548,781 46
Add earnings, of 1887, . . .		187,728 29
		$736,509 75
Deduct dividend of February 15, 1887, . . .	$160,000	
Deduct dividend of August 25, 1887, . .	40,000	
		200,000 00
Leaving balance of assets, Jan. 1, 1888,		$536,509 75

A dividend of $4.00 per share, or $160,000 payable February 15th, has been declared, which, with dividend of $1.00 per share, paid August 25th last, makes total for the year $200,000.

The usual financial statements are submitted, and also the report of the agent, which states clearly the present condition of our property.

THOMAS F. MASON,
President.

New York, *February* 20, 1888.

General Summary of Receipts and Expenditures of the Quincy Mining Company from its organization to December 31, 1887.

Expenditures.

For expenditure on location previous to 1856,	$42,097	98
For expenditure on Quincy vein, 1858 not now worked,	55,000	00
For openings and explorations on 3,800 feet "east" or Pewabic vein, extending to Portage Lake, preparatory to future work,	11,500	00
For real estate and permanent improvements on same, including dwelling houses, stamp mill, machinery, steam engines, tram road, dock warehouse, and other buildings and roads,	1,018,147	67
For mining and surface labor, expenses of smelting and marketing copper, and all incidental expenses,	12,374,885	06
Balance carried down,	5,146,509	75
	$18,648,140	46

Receipts.

From capital stock paid in,	$200,000	00
From proceeds Copper and Silver (93,853,639 lbs. Copper),	18,184,286	41
From interest,	126,266	46
From profit on sale P. L. & R. Im-		

provement Company stock, and other investments, . . .	79,637 16
From sales of Real Estate, Hancock, Michigan, ...	57,950 43
	$18,648,140 46
By balance brought down, being receipts over expenditures, . .	$5,146,509 75
Deducting devidends declared, Nos. 1 to 38 inclusive, ...	4,610,000 00
Leaving balance as per statement in detail on next page, . . .	$536,509 75

STATEMENT.

Of assets and Liabilities, exclusive of Real Estate, Mine plant and Supplies in use.

JANUARY 1, 1888.

Assets.

Loans on call, ...	$275,000 00
Cash in Bank, ...	11,387 14
Cash on hand at mine, ...	8,234 13
Copper on hand, sold, ...	232,539 97
Accounts receivable, ...	11,552 00
	$538,713 24

Liabilities.

Drafts unpaid, . . .	$40,377 24	
Dividends unpaid, . .	799 50	
Accounts payable in New York, ...	11,875 00	
Accounts payable at mine .	20,843 34	73,895 08
		$464,818 16

Add at mine, viz. :		
Supplies per inventory on file,	$63,088 50	
Farm account (horses, wagons, etc.),	8,574 49	
Accounts receivable,	28 60	71,691 59
		$536,509 75

Less dividend payable February 15th, 1888, $4.00 per share, $160,000.

Summary for Year.

Average force employed,	447 men.
Average number of miners,	142 "
Average wages of miners on contract, per month,	$48.40
Yield of mineral per fathom of ground broken,	976 lbs.
Yield of refined copper per fathom of ground broken,	781 "
Total rock mined,	124,289 tons.
Total rock hoisted,	96,370 "
Total stamp rock treated,	94,250 "
Yield of rock stamped,	mineral, 3.23%
Product stamp mineral,	6,092,475 lbs.
Product masses,	651,035 " 6,743,510 lbs
Product refined copper,	5,609,762 "

AGENT'S REPORT.

QUINCY MINE, HANCOCK, MICH.,
JANUARY 31, 1888.

The following report of our operations at the mine for the past year is respectfully submitted.

The general appearance and productiveness of the vein, in both the north and south portions of the mine, continued favorable throughout the year.

No. 2 shaft was sunk from the thirty-fifth to the

thirty-seventh level. This shaft, is still several feet west of the main copper-bearing part of the vein belt, but during the last one hundred feet in sinking it passed through several bunches of vein matter carrying good stamp rock.

The drifting done from this shaft was at the thirty-seventh, thirty-sixth and thirty-fifth levels north. The thirty-seventh level was drifted a few feet south of shaft, and the thirty-sixth level was connected south with the drift from No. 4 shaft. Those openings showed a good average of productive vein, characterized by stretches of lean ground, low-quality vein, and blocks more or less rich in the different grades of copper.

The principal stopping done in this part of the mine was at different points at and between the thirtieth, thirty-first, thirty-second, thirty-fourth and thirty-fifth levels north, and in a block of rich ground at the thirty-third level south of shaft. Considerable good stopping ground is still available here and there between the twenty-eighth and thirty-fifth levels north and south of both shafts ; while at and below the thirty-sixth level but little stopping at all has been done either at No. 2 or No. 4 shaft.

No. 4 shaft was sunk from fifty feet below the thirty fifth level to the thirty-seventh level. This shaft is also a little west of the main copper-bearing part of the lode, but showed, in sinking, occasional patches of good stamp rock.

The drifting done from this shaft was at the thirty-seventh level north, the thirty-sixth level north and south, and at the thirty-fifth, thirty-fourth thirty-third and thirtieth levels south. Most of the vein exposed in the thirty-sixth and thirty fifth levels is very promising. The vein shown in the thirty-fourth and thirty-third levels is more bunchy, having stretches of alternating good and poor ground.

The vein in the thirty-second and thirtieth levels, while showing occasional bunches of paying ground, is narrow and of much poorer quality than it is in the lower levels.

The principal stopping done in this part of the mine was at and between the thirty-second, thirty-third, thirty-fourth and thirty-fifth levels north and south of shaft.

The man-engine shaft was extended and put in

working order from the twenty-ninth to the thirty-first level, and is now being sunk towards the thirty-third level.

The diamond drill was not used much during the year. A few holes only were bored at the twenty-fifth level north of No. 2 shaft, but nothing of value was discovered.

The accompanying maps, filled up as usual to the end of the year, show as near as may be the position and extent of work done in the various openings.

Several unavoidable accidents during the year caused more or less serious delay both at the mine and the mill. Those mishaps, however, were mostly overcome in good time, and eventually we shall profit by the improvements made by way of reconstruction.

On the night of June 7th the Rock House and adjuncts, with nearly all machinery enclosed, were totally destroyed. The fire undoubtedly was caused by lightning, which struck the Drum House at head of main "Incline," and the whole range of buildings was soon a mass of flames, which it was impossible to extinguish.

Means were at once improvised, by erecting a temporary Rock House, for handling the rock and sending it to mill, and regular running operations were resumed as soon as possible.

On the 24th of August the stamp mill was closed down for some time, on account of the breaking of both main-engine shafts. This caused the stoppage of the mill for about four weeks; and as the burning of the Rock House, Drum House, etc., necessitated a delay of about the same time, the total suspension of the stamp mill covered a period of nearly two months

During the summer the water pipes which supplied the mine boilers from the lake gave out, but, fortunately, no serious breakage occurred, and a new line of six-inch cast-iron pipes, some forty-four hundred feet in length, was laid and put in use. As the old pump at the mill was becoming inadequate to this service, it was replaced by a new compound one—size $\frac{14}{20}$ x 7 x 12—which makes this plant complete, and independent of the rest of the works, and sufficient for all probably contingencies.

The New Rock House was ready for use about the middle of November. It stands several hundred feet north of the old one, being just opposite to No. 7 shaft. It is designed and equipped for doing the best possible service. Steam for operating it is taken from the main boilers at the mine.

For the transportation of rock a substantial trestle work was built for car tracks, over which the rock is sent from the Shaft Houses to the Rock House.

From Rock House to head of "Incline" a second gravity road was built, and the old tram road was made new throughout, thus completing an entirely new outfit all the way from the stamp mill to No. 4 shaft.

The fire plant for the mine was finished early in the season, and proved to be of great value, for by its use the other nine buildings were saved at the time of the Rock House fire.

At the mine boiler house an additional railroad trestle for side track was built, and the coal yards, both at the mine and the mill, were considerably enlarged so as to hold the needed supply of fuel.

A new dump scow for the removal of stamp sand has been built, and will be ready for use next season.

S. B. HARRIS, *Agent.*

Schedule C

STATE OF MICHIGAN, OFFICE OF THE SECRETARY OF STATE. } ss.

I, DANIEL E. SOPER, Secretary of State of the State of Michigan, DO HEREBY CERTIFY, that I have compared the annexed copy of Amendment to Articles of Association of Quincy Mining Company, with the original articles filed in this office June 14, 1889, and that it is a true and correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Michigan, at Lansing, this 25th day of November, in the year of our Lord one thousand eight hundred and ninety-one.

SEAL.

DANIEL E. SOPER,
Secretary of State.

At the annual meeting of the Quincy Mining Company, duly notified as required by the Mining Law of Michigan, under which the corporatien is organized, and held at the Company's office, 52 Broadway, New York City, there being represented personally and by proxy 35,237 shares, the following preambles and resolutions was adopted :

Whereas, Section twenty of the Mining Law of 1877, of the State of Michigan, under which the Quincy Mining Company was organized and now exists, provided, "Subject to the limitations of section four of this act, the capital stock and number of shares may be increased or diminished at any meeting called for that purpose by a vote of two-thirds of the capital stock of the corporation, and at such meeting the stockholders shall have power to make all necessary provisions for calling in and cancelling the old and issuing new certificates of stock ; and

Whereas, There being thirty five thousand, two hundred and thirty-seven (35,237) shares of stock represented at this meeting, being in excess of two-thirds of the forty thousand shares into which the capital stock of the Company is divided, notice of the meeting as the law requires having been published for two weeks in the Portage Lake Mining Gazette, of Houghton County, Michigan, a copy of such notice mailed postage paid to each stockholder of record at his post office address, as appears on the

books of the corporation, twenty days before the time of meeting, and a certificate of the publication and mailing of said notices being on record and made a part of this meeting of stockholders, be it therefore

Resolved, That now having fully complied with the provisions of the aforesaid section of the Mining Law of the State of Michigan, the capital stock of the Quincy Mining Company be and is hereby increased from forty thousand to fifty thousand shares of the par value of twenty-five dollars each, making the future capital of the Company one million two hundred and fifty thousand dollars fully paid-up stock.

Resolved, That the Directors have power to order the ten thousad shares of increased stock, the whole or any part, to be issued at such time or times as they may decide, and to direct by vote how this increased stock shall be sold, used or appropriated for the benefit of the Company.

THOS. F. MASON,
President.

A true copy,
Attest:
WM. R. TODD,
Secretary.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.*

Wm. R. Todd, being duly sworn, on his oath doth depose and say that he is the Secretary of the Quincy Mining Company and that the foregoing copy of Resolutions of said Company so subscribed by him is a true and correct copy from the records of said company.

In witness whereof I have hereunto set my hand and affixed my official seal this 7th day of June, A. D., 1889.

CHARLES NETTLETON,
Commissioner for Michigan in New York,
[Seal.] 115 and 117 Broadway, N. Y. City.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } ss.

THOMAS F. MASON, being duly sworn on his oath, doth depose and say that he is the President of the Quincy Mining Company, and that the foregoing copy of Resolutions of said Company so subscribed by him is a true and correct copy from the records of said company.

In witness whereof, I have hereunto set my hand and affixed my official seal this 12th day of June, A. D. 1889.

[Seal]

CHARLES NETTLETON,
Commissioner for Michigan in New York,
115 and 117 Broadway, New York.

CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

JOHN O. SHAW, JR., *Trustee*,

v.

THE QUINCY MINING COMPANY, THOMAS F. MASON, THOMAS H. MASON AND WILLIAM HART SMITH. } In Equity

To the Judges of the Circuit Court of the United States for the Southern District of New York:

John O. Shaw, Jr., of Boston, in the County of Suffolk and Commonwealth of Massachusetts, a citizen of the State of Massachusetts, in his capacity as Trustee under the will of Elizabeth

H. Rogers deceased, late of Boston, in the County of Suffolk and Commonwealth of Massachusetts, brings this, his bill of complaint in behalf of himself and all other stockholders of the Quincy Mining Company, who are similarly situated, and who shall be entitled to avail themselves of the bene fit of this suit, not joined as respondents, against the Quincy Mining Company, a corporation duly organized under the laws of the State of Michigan, and having a usual place of business in the City, County and State of New York, Thomas F. Mason, of the City, County and State of New York, and Thomas H. Mason and William Hart Smith, both of the City, County and State of New York, individually and as co-partners, doing business as brokers under the name of Mason & Smith, all of whom are citizens of the State of New York.

And thereupon your orator complains and says that he is a stockholder in the said Quincy Mining Company, and has been continuously since the 5th day of June, A. D. 1889, and further shows upon information and belief, and stands ready to prove the fact so to be, that on said 5th day of June, 1889, the said Quincy Mining Company voted to increase its capital stock from forty thousand (40,000) to fifty thousand (50,000) shares, and that said increase of ten thousand (10,000) shares should remain in the treasury of said Company for the purpose of purchasing the Pewabic property, so-called, which lies adjacent to the property of the said Quincy Mining Company, in the town of Houghton, and State of Michigan, whenever the said Pewabic property shall be on the market for sale.

That the said Thomas F. Mason is a large stockholder in and is president and director of the said Quincy Mining Company, and now has and has had for many years control of said corporation and of

the majority of its directors and full control of its affairs.

And your orator further shows upon information and belief, and stands ready to prove the fact so to be, that said Thomas F. Mason caused the said Thomas H. Mason, who is his son, and William Hart Smith, both of whom were and are stockholders in the said Quincy Mining Company, and were cognizant of the aforesaid vote of said Quincy Mining Company, to purchase said Pewabic property at a sale of the same in said Houghton, in said State of Michigan, on January 24th, A. D. 1891, for the sum of seven hundred and ten thousand dollars ($710,000.00).

And your orator further shows upon information and belief, and stands ready to prove the fact so to be that in purchasing the said Pewabic property for the said sum of seven hundred and ten thousand dollars ($710,000), the said Thomas H. Mason and William Hart Smith acted as agents for the said Thomas F. Mason, President as aforesaid, and paid for the same with money furnished by the said Thomas F. Mason, and that said Thomas F. Mason made said purchase through his said agents for and on behalf of the said Quincy Mining Company.

And your orator further shows upon information and belief, and stands ready to prove the fact so to be that immediately upon said Mason and Smith receiving a deed of said property, said Thomas F. Mason, in breach of his said fiduciary relation to said Quincy Mining Company, did not cause the said Pewabic property to be transferred to the said Quincy Mining Company directly, but instead of so doing, treated the said sale to his said agents, Thomas H. Mason and William Hart Smith, as a sale to them personally and caused them to transfer said property to the said Quincy Mining Company,

and on February 4th, A. D., 1891, said Thomas F. Mason caused a meeting of the Board of Directors of said Quincy Mining Company to be called at the office of said Company in said New York City, and by his influence and full control of the Directors of said Company, caused a majority of said Directors to issue said ten thousand shares of the capital stock of the said Quincy Mining Company to the said Thomas H. Mason and William Hart Smith in payment to them for the said Pewabic property.

And your orator further shows upon information and belief and stands ready to prove the fact so to be that on the completion of said transfer the said Thomas F. Mason, by reason of his said control over said directors, caused said directors to vote for the payment of and caused said Mining Company to pay to the said Thomas H. Mason and William Hart Smith a sum of ninety thousand dollars ($90,000) alleged to have been expended by said Thomas H. Mason and William Hart Smith for counsel fees and legal advice incurred in the transaction above set forth, which payment your orator avers was a misapplication of the property of the said Company.

And your orator further shows unto your Honors upon information and belief, and stands ready to prove the fact so to be, that the value of said ten thousand (10,000) shares of the said capital stock, at the time when the same were issued to the said Mason and Smith, as aforesaid was about one million one hundred thousand dollars, ($1,100,000); and that the difference between the value of the said shares of the said capital stock, and the said seven hundred and ten thousand dollars ($710,000) paid for the said Pewabic property, at the said sale, as aforesaid, is a profit taken from your complainants and the other stockholders in the said Quincy Mining Company, not joined as respondents hereto, by the

said Thomas F. Mason and the said Thomas H. Mason and the said William Hart Smith, in fraud of your complainant and all other of said stockholders; that said Thomas F. Mason participated in such profit, and that said transaction, as a whole, was a fraud upon your orator and all other stockholders of said Quincy Mining Company, not joined as respondents hereto.

And your orator further shows that he was unable to prevent the accomplishment of the said fraud, the said transfer of the said ten thousand (10,000) shares of the said capital stock, as aforesaid, through and by reason of the said control by the said Thomas F. Mason of the majority of the said directors of the said Quincy Mining Company, that any attempt on his part to prevent same would have been futile and of no effect, for the same reason.

And your orator further shows upon information and belief, and stands ready to prove the fact to be, that on June 5th, 1889, and ever since, the said Thomas F. Mason has owned or controlled a majority of the stock of the said Quincy Mining Company, and has had control of the election of directors, and all proceedings at the meetings of the Stockholders and Board of Directors of the said Mining Company; that by vote of said corporation, the whole control of the management of the said ten thousand (10,000) shares of the said capital stock, created for the purpose of purchasing the said Pewabic property, as hereinbefore set forth, was entrusted to the Board of Directors; and your orator is informed and stands ready to prove the fact to be, that in pursuance of said fraud, and in fraud of the said stockholders of the said corporation, the said ten thousand (10,000) shares of the said capital stock were fraudently transferred and issued to the said Thomas H. Mason and William Hart Smith.

And your orator says that this suit is not a collusive one to confer on this Court jurisdiction of a case of which it would otherwise not have cognizance.

Wherefore your orator prays:

1st. That it may be adjudged and decreed that the issue of the said ten thousand (10,000) shares of the said capital stock of the said Quincy Mining Company, to the said Thomas H. Mason and the said William Hart Smith, was fraudulent and illegal, and that said Quincy Mining Company has the right to repudiate and cancel the same as to the said Thomas H. Mason and the said William Hart Smith, both as individuals and as co-partners, and that it be ordered and directed so to do.

2nd. That all of the said ten thousand (10,000) shares of the said capital stock of the said company, held, owned or controlled by the said Thomas H. Mason and the said William Hart Smith, whether individually or as co-partners, be declared annulled and cancelled, and that said respondents be ordered and directed to surrender and deliver up for cancellation all certificates held, owned or controlled by them for any such shares, and that such certificates be cancelled, and that upon such surrender the said Quincy Mining Company be ordered to pay to the said Thomas H. Mason and William Hart Smith the sum of seven hundred and ten thousand ($710,000) dollars, paid by them for said Pewabic property.

3d. That it be adjudged and decreed that the said sale of the said Pewabic property by the said Thomas H. Mason and the said William Hart Smith to the said Quincy Mining Company, made as aforesaid, be declared annulled, and the said Quincy Mining Company be ordered and directed to reconvey the same to the said Thomas H. Mason and the said William Hart Smith.

4th. That it be adjudged and decreed that the said respondents, Thomas F. Mason, Thomas H. Mason and William Hart Smith, account to the said Quincy Mining Company for any of said ten thousand (10,000) shares of stock, so obtained by them, not delivered up to be cancelled, as aforesaid, and to pay the full value of said stock to said Company.

5th. That it be adjudged and decreed that the respondents, Thomas F. Mason, Thomas H. Mason and William Hart Smith, account to said Quincy Mining Company respectively, for all profits derived by them from the said ten thousand (10,000) shares of said capital stock, or the certificates therefor, and the sale, transfer or disposition thereof, and pay the amount of such profits to said Company, as money had and received in trust for said Company.

6th. That it be adjudged and decreed that the said Thomas H. Mason and the said William Hart Smith are jointly and severally liable to said Company for the sum of ninety thousand dollars ($90,000), paid to them to be applied to counsel fees and legal expenses in the transactions above set forth, as money had and received in trust for said Company, and that they be ordered to repay the same to said Company.

7th. That it be adjudged and decreed that the respondents, Thomas F. Mason, Thomas H. Mason and William Hart Smith are jointly and severally liable to said Quincy Mining Company for all loss or damage suffered by said Company by reason of the issue of the said ten thousand (10,000) shares of the said capital stock and the certificates therefor, to the said Thomas F. Mason, Thomas H. Mason and William Hart Smith, and that the said respondents pay to said Mining Company the amount of said loss or damage.

8th. If said sale of said Pewabic property to the said Quincy Mining Company by said Thomas H. Mason and said William Hart Smith be adjudged by your Honors to be binding upon said Company, then that the respondents Thomas F. Mason, Thomas H. Mason and William Hart Smith be adjudged and decreed to be liable to said Mining Company for the full amount of the said ten thousand (10,000) shares of the said capital stock at the full value of the same, together with all profits or dividends received thereon from the said Mining Company, as money had and received in trust for said Company, less the said sum of seven hundred and ten thousand dollars ($710,000) actually paid by said Thomas H. Mason and said William Hart Smith.

9th. That upon entry of an interlocutory decree herein directing the respondents, Thomas F. Mason, Thomas H. Mason and William Hart Smith, to render an account, that said respondents be enjoined and restrained by a temporary restraining order, and by a preliminary writ of injunction, from alienating, transferring, selling or disposing of, or in any way parting with, any certificate or certificates in their possession or custody, or under their control, representing any of the said ten thousand (10,000) shares of the said capital stock of the said Company and from transferring any of said shares.

10th. That upon the entry of an interlocutory order herein directing the respondents, Thomas F. Mason, Thomas H. Mason and William Hart Smith, to render an account that the respondent the Quincy Mining Company, be enjoined and restrained by a temporary restraining order and by a preliminary writ of injunction from paying any dividends or profits on said ten thousand (10,000) shares of said capital stock to said Thomas H. Mason and said William Hart Smith, and from transferring the same on the books of said Company.

11th. That your orator may have such other or further or different relief in the premises as to the Court may seem meet.

To the end, therefore, that the said respondents may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the utmost of their knowledge, remembrance, information and belief, the said Quincy Mining Company, under its corporate seal and the said individual respondents not under oath—an answer under oath being hereby as to them expressly waived—to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were especially interrogated thereunto severally :

May it please your Honors to grant unto your orator a writ of *subpœna ad respondendum* issuing out of and under the seal of this Honorable Court to be directed to the said respondents, commanding them and each of them on a certain day and under a certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further, to stand, do, perform and abide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orator will ever pray.

JOHN O. SHAW, JR.,
Trustee under will of Elizabeth H. Rogers.
FRANK E. BLACKWELL
Sol'r for Complainant.

FRANK E. BLACKWELL,
Of Counsel.

UNITED STATES OF AMERICA, }
DISTRICT OF MASSACHUSETTS, } *ss.* :

On the second day of September, A. D., 1891, before me personally appeared John O. Shaw, Jr., to me known, who, being by me duly sworn, did depose and say : That he was the complainant in the said bill of complaint and a stockholder of the Quincy Mining Company ; that he has been such stockholder since June 5th, A. D., 1889 ; that he has read the said bill of complaint and knows the contents thereof, and that the matters and things therein contained are true to his knowledge, except as to the matters which are herein stated to be alleged upon information and belief, and that as to these matters he believes the same to be true.

WILLIAM R. RICHARDS,
[SEAL.] Notary Public.

Subscribed and sworn to before me at Boston, in said District, this 2d day of September, A. D. 1891.

[Endorsed:] U. S. Circuit Court, Southern District of N. Y. John O. Shaw, Jr., Trustee, *vs.* The Quincy Mining Co., *et al*—Bill of Complaint. Frank E. Blackwell, Solicitor for Complainant, No. 140 Pearl Street, N. Y. City. U. S. Circuit Court. Filed Sept. 3, 1891, John A. Shields, Clerk.

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK. } *ss.*

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States, in and for the Second Circuit, and Southern District of New York, do hereby certify, that I have compared the preceding pages from number eight to and including number forty-eight, with the original on file and of record in my office, and that the same are true and correct transcripts therefrom and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the District and Circuit above named, this sixth day of January, in the year one thousand eight hundred and ninety-two, and of our Independence the one hundred and sixteenth.

JOHN A. SHIELDS,

(SEAL.) *Clerk.*

Office Supreme Court U. S.
FILED.
JAN 18 1892
JAMES. H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

Ex parte,

JOHN O. SHAW, JR., Trustee,

Petitioner.

Brief on behalf of Petitioner on motion for rule to show cause why a Writ of Mandamus should not issue.

MICHAEL H. CARDOZO,

Of Counsel for Petitioner.

PRESS OF CLARENCE S. NATHAN, 202 FULTON ST., N. Y.

IN THE

Supreme Court of the United States.

Ex Parte,

JOHN O. SHAW, JR., *Trustee*,

Petitioner.

Brief on behalf of Petitioner.

STATEMENT OF FACTS.

On or about the 3rd day of September, 1891, a suit was commenced by John O. Shaw, Junior, Trustee, the petitioner herein, against the Quincy Mining Company, Thomas F. Mason, Thomas H. Mason and William Hart Smith, in the Circuit Court of the United States for the Southern District of New York, and said suit is now pending, at issue and undetermined.

Annexed to said petition and marked "Exhibit A," is a copy duly certified by the Clerk of said Circuit Court of the United States, of all the papers filed in said suit, and used upon the motion hereinafter referred to, (printed papers, pp. 8 to 49).

The subpœna in said suit was duly served upon the defendant, the Quincy Mining Company, by the United States Marshal for the Southern District of

New York, at the City of New York, in said district, on the 4th day of September, 1891, and said subpœna was likewise served upon the individual defendants in said City, as appears from the return of the Marshal, marked "Schedule A" in said "Exhibit A," (pp. 22, 23).

All of said defendants entered a general appearance in said suit on the 5th day of October, 1891, (p. 24).

The petitioner was, at the time of the commencement of said suit, a citizen and resident of the State of Massachusetts, and all of the individual defendants were, at the commencement of said suit, citizens of the State of New York, and residents of the City of New York, in the Southern District of New York, (Complaint, p. 40).

The defendant, the Quincy Mining Company, at the time of the commencement of said suit, was a corporation organized under the laws of the State of Michigan, pursuant to an act of the Legislature of said State, approved May 11th, 1877, and Section 30 of said Act expressly provides as follows:

"It shall be lawful for any company associating under this act to provide in the articles of association for having the business office of such company out of this State, and to hold any meetings of the stockholders or Board of Directors of such company at such office so provided for, but every such company having its business office out of this State shall have an office for the transaction of business within this State, to be also designated in such articles of association," (p. 27).

The fifth article of the articles of association of the Quincy Mining Company, provides as follows:

"The business office of the company hereby constituted and formed shall be in the City, County and State of New York, and another business office is hereby established at

the Quincy Mine in the County of Houghton and State of Michigan," (p. 28).

Beginning in the year 1878, and at all times thereafter and at the time of the commencement of said suit, the Quincy Mining Company had its principal and general office for the transaction of its business in the City of New York, and had no other office except at the mines of the company in Michigan, which latter office was used solely for the purpose of carrying on the business attending upon the local workings of the mines of said company, (pp. 19, 20).

The directors of said Company are five in number, and they have always had their meetings in the City of New York, and all of the reports made by the President of said Company to the Board of Directors are dated at the City of New York, (pp. 19, 20, 29).

William R. Todd, the Secretary of said Company, has been such since March 6th 1878, and has always had and had at the time of the commencement of said suit, charge of the general office of said Company in the City of New York, at No. 52 Broadway, in the City of New York, and said Todd has likewise, during all of said years, filled the office of Treasurer of said Company, and the only other officer of said Company at the time of the commencement of said suit was the defendant, Thomas F. Mason, who was the President of said Company, (pp. 19, 20, 29).

After the commencement of said suit, and after said defendants had all appeared therein, the Quincy Mining Company, moved in said Circuit Court for an order permitting it to withdraw the general appearance which it had entered in said action, and

for leave to enter a special apppearance therein, and to set aside the service of the subpœna upon it, upon the ground that it was not an inhabitant of the State of New York at the the time of the commencement of said suit, within the meaning of the act of Congress of March 3d, 1875, as amended in 1887 and 1888, (pp. 11 to 14).

The motion came on to be heard before Judge Lacombe, and after hearing said motion he made an order allowing said Company to amend its general notice of appearance by making it a special one, and setting aside the service of the subpœna in said suit upon the said Company upon the ground that it was not an inhabitant of the State of New York, and resident of the Southern District of New York at the time of commencement of said suit, (pp. 9,10).

The petition further alleges that although the Quincy Mining Company was organized under the laws of the State of Michigan, it had become by reason of the facts and circumstances therein set forth an inhabitant of the State of New York, and a resident of the City of New York, in the Southern District of New York, all of which appeared before the Circuit Court upon the hearing of said motion, (pp. 6, 7).

The petitioner also alleges that by reason of the order made in the Circuit Court, the petitioner is prevented from exercising his right to sue the Quincy Mining Company in the manner he is advised he is entitled to do by the Act of Congress of March 3, 1875, as amended in 1887 and 1888, to wit, in the district in which said Company had become an inhabitant and resident at the time of the service of the writ of subpœna, and that he is without any remedy to compel the said Circuit Court to exercise the said jurisdiction, inasmuch as the order setting aside the

service of the writ of subpœna is not a judgment from which an appeal lies, and concludes with a prayer that a writ of mandamus may be issued by this Court to compel the Judges of the Circuit Court to take jurisdiction and proceed in said suit, and to strike from the record the order setting aside the service of the writ of subpœna (p. 7).

The motion is made upon the petition of the complainant in said suit, and annexed to said petition, and forming part of it, is a certified copy of every paper filed and order entered in said suit in said Circuit Court, and used upon said motion, and the memorandum filed by the Court upon the granting of the motion.

POINTS.

First.

This Court has power to issue writs of mandamus in all cases "warranted by the principles and usages of law," to any Courts appointed under the authority of the United States.

U. S. Revised Statutes, §688.

It is elementary that a writ of mandamus is the proper remedy to require an inferior Court to assume jurisdiction of a case which properly belongs to it.

In re Pennsylvania Co., 137 U. S., 451.

In this case at page 452, Mr. Justice Bradley, says :

"The first question to be decided is, whether this "Court has power to grant the writ applied for. "The general power of the Court to issue a writ of "mandamus to an inferior court, to take jurisdiction "of a cause when it refuses to do so, is settled by a "long train of decisions. Ex parte Bradstreet, 7 "Pet., 634; Life and Fire Ins. Co. *vs.* Wilson, 8 "Pet., 291; United States *vs.* Gomez, 3 Wall., 752; "Ex parte Roberts, 15 Wall., 384; Ex parte United "States, 16 Wall. 699, 702; Ins. Co. *vs.* Comstock, "16 Wall., 258, 271; Railroad Co., *vs.* Wiswall, 23 "Wall., 507; Ex parte Schollenberger, 96 U. S., "369; Harrington *vs.* Holler, 111 U. S., 796; Ex "parte Brown, 116 U. S., 401; Ex parte Parker, "120 U. S., 737; Ex parte Hollon Parker, 131 U. S., "221.

"It is true that after a case has proceeded to the "filing of a declaration and a plea to the jurisdic- "tion, or its equivalent, and a judgment is ren- "dered in favor of the plea and a consequent dis- "missal of the action, this Court has held that the "plaintiff is confined to his remedy by writ of error, "and cannot have a mandamus, which only lies, as "a general rule, where there is no other adequate "remedy. Ex parte Balt. & Ohio Railroad, 108 U. "S., 566; Ex parte Railway Co., 103 U. S., 794. "But it was expressly held in Railroad Co. *vs.* Wis- "wall, 23 Wall., 507, that a mandamus would lie "to compel a Circuit Court to take jurisdiction of "and proceed with a case which it had wrongfully "remanded to the State Court. The reason was "that an order to remand was not a final judgment, "and no writ of error would lie. This case is "supported by the rule laid down by Chief Justice "Marshall in Ex parte Bradstreet, 7 Pet., 634; and "if the decision of the present case depended only "on the general rule, the power of the court to "issue the mandamus would be undoubted."

Unless the petitioner can obtain a writ of mandamus, he has no other adequate remedy.

The Act of Congress, approved February 25th, 1889, (25 Stats. at Large, page 693) does not impair the right of the petitioner to the writ. It only provides

for the review of a final judgment or decree in cases in which there shall have been a question involving the jurisdiction of the Circuit Court.

And it is manifest that under the decision of this Court in McLish *vs.* Roff, 12 Supreme Ct. R. 118, (decided Dec. 7, 1891) that the order setting aside the service of process upon the Quincy Mining Company is not such an order as could be reviewed here under Section 5 of the Act of Congress of March 3, 1891, (26 Stat. at Large 826).

Assuredly, Congress did not intend, by these Acts, to take from this Court its power to issue a writ of mandamus to compel an inferior court to exercise the jurisdiction lawfully conferred upon it. There is no express repeal of Section 688 of the Revised Statutes, and no implied repeal is to be inferred.

It is well settled in this Court that repeals by implication are not favored and not allowed, save where repugnancy and inconsistency are plain and unavoidable.

Chew Heong *vs.* United States, 112 U. S., 536.

In this case at page 549, Mr. Justice Harlan says:

"The rule is well settled, that repeals by implication
"tion are not favored, and are never admitted where
"the former can stand with the new act. Ex parte
"Yerger, 8 Wall. 85, 105. In Wood *vs.* U. S., 16 Pet.
"342, 362, Mr. Justice Story, speaking for the Court,
"upon a question of the repeal of a statute by im-
"plication, said: 'That it has not been expressly
"or by direct terms repealed is admitted, and the
"question resolves itself into the narrow inquiry
"whether it has been repealed by necessary impli-
"cation. We say, by necessary implication; for it
"is not sufficient to establish that subsequent laws
"cover some, or even all, of the cases, provided for
"by it, for they may be merely affirmative, or cumu-
"lative, or auxiliary. But there must be a positive

" repugnancy between the provisions of the new laws " and those of the old, and even then the old law is " repealed by implication only *pro tanto*, to the ex- " tent of the repugnancy.' In State *vs.* Stoll, 17 " Wall. 425, 430, the language of the Court was that " ' it must appear that the later provision is certainly " and clearly in hostility to the former. If by any " reasonable construction the two statutes can stand " together, they must so stand. If harmony is im- " possible, and only in that event, the former law is " repealed in part or wholly, as the case may be.' " See also, Ex parte Crow Dog, 109 U. S., 556, 570 ; " Arthur *vs.* Homer, 96 U. S., 137, 140 ; Harford *vs.* " U. S., 8 Cranch 109 "

Certainly, the creation of a new and inadequate remedy, such as may be claimed is given by the Act of Congress of 1889, has never been known to take away a pre-existing and wholly adequate one.

Assuredly, if, as said by Judge Bradley, in the case of the Pennsylvania Co., above cited, that "it " is unquestionably a general rule that the abroga- "tion of one remedy does not affect another," the fact that the petitioner may, possibly, after a decision on the merits against him in the suit referred to in the petition, take an appeal which would possibly bring up the correctness of the order, setting aside the service of the writ of subpœna, cannot be deemed an adequate remedy and should not, therefore, be held to impair his right to a mandamus.

Well may we urge what was likewise said by this Court in the same case (p. 454). "It is true " that the general supervisory power of this Court " over inferior jurisdictions is of great moment in a " public point of view, and should not, upon light " grounds, be deemed to be taken away in any " case."

Second.

The Circuit Court of the United States for the Southern District of New York, had jurisdiction of the suit brought by the petitioner against the Quincy Mining Company, and others, referred to in the petition herein.

The Act of Congress of March 3d, 1887 (24 Stats. at Large, 552), as amended by that of August 13th, 1888 (25 Stats. at Large, 433), provides:

"That the Circuit Courts of the United States "shall have original cognizance * * * of all "suits of a civil nature * * * in which there "shall be a controversy between citizens of differ- "ent States."

The same section of the statute in question also provides that:

"No person shall be arrested in one district for "trial in another in any civil action before a Circuit "or District Court; and no civil suit shall be brought "before either of said Courts against any person by "any orginal process or proceeding in any other "district than that whereof he is an inhabitant; "but where the jurisdiction is founded only on the "fact that the action is between citizens of differ- "ent States, suits shall be brought only in the dis- "trict of the residence of either the plaintiff or the "defendant."

The corresponding provision of the Act of Congress of March 3rd, 1875 (18 Stats. at Large, 470), reads as follows:

"And no civil suit shall be brought before either "of said courts against any person by any original "process or proceeding in any other district "than that whereof he is an inhabitant, or in

"which he shall be found at the time of serving "such process or commencing such proceeding."

The Act of 1875 in this respect was substantially a re-enactment of the Act of 1789.

U. S. R. S., § 739.

It will be observed that the words, "or in which "he shall be found at the time of serving such pro- "cess or commencing such proceeding," are wholly omitted from the Act of 1887, as amended in 1888.

Where, therefore, the jurisdiction of the Circuit Court is dependent wholly upon diverse citizenship, as in the case referred to in the petition, the suit must be brought in the district in which the plaintiff or defendant resides.

There can be no question but that the required diverse citizenship between the parties necessary to confer jurisdiction upon the Circuit Court of the United States existed in the suit referred to.

The only question is whether the suit is brought in the proper district, for it must be brought in the district of which the plaintiff or defendant is an inhabitant, or whereof one is a resident.

It is now the settled doctrine of this Court that a corporation created under the laws of a particular State is conclusively presumed to be a citizen of that State, and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a Court of the United States.

Steamship Co. *vs.* Tugman, 106 U. S.. 118.

In this case, at p. 120, Mr. Justice Harlan, says:

"In Ohio & Mississippi Railroad Co. *vs.* Wheeler,

"1 Black, 286, the Court, speaking by Mr. Chief-
"Justice Taney, said, that in the previous case of
"Louisville, Cincinnati & Charleston Railroad Com-
"pany *vs.* Letson, 2 How., 497, it had been decided,
"upon full consideration, 'that where a corporation
"is created by the laws of a State, the legal pre-
"sumption is that its members are citizens of the
"State in which alone the corporate body has a legal
"existence; and that a suit by or against a cor-
"poration, in its corporate name, must be presumed
"to be a suit by or against citizens of the State
"whch created the corporate body; and that no
"averment or evidence to the contrary is admissible,
"for the purposes of withdrawing the suit from the
"jurisdiction of a Court of the United States.'
"Marshall *vs.* Baltimore & Ohio Railroad Co., 16
"How., 314; Covington Drawbridge Co. *vs.* Shep-
"herd, 20 Id. 207; Insurance Company *vs.* Ritchie, 5
"Wall. 541; Paul *vs.* Virginia, 8 Id. 168; Railroad
"Company *vs.* Harris, 12 Id. 65."

The question which therefore arises is whether this corporation, the Quincy Mining Company, organized under the laws of the State of Michigan (and hence a citizen of that State), had become an inhabitant and resident of the City of New York, at the time of the commencement of the suit referred to in the petition.

1. The term "citizen" and "inhabitant" or "resident" are not synonomous terms, though the words "inhabitant" and "resident" may well be and are usually so regarded.

An allegation of residence is not the equivalent of an allegation of citizenship.

Denny *vs.* Pironi, 141 U. S., 121.

In this case, at page 123, Mr. Justice Brown, says:
"That an averment of residence is not the equivalent
"of an averment of citizenship, and is insufficient to
"give the Circuit Court jurisdiction, has been settled

"in a multitude of cases in this Court, (Parker *vs.* "Overman, 18 How. 137; Robertson *vs.* Cease, 97 "U. S., 646; Everhart *vs.* College, 120 U. S., 223; "Menard *vs.* Goggan, 121 U. S., 253)."

2. This Court has distinctly held that where the word "citizen" is found in Section 5508 of the United States Revised Statutes, it is used in its strict sense as contrasted with the word "alien," and not as synonymous with the word "resident" or "inhabitant."

See

Baldwin *vs.* Franks, 120 U. S., 678.

"Citizen" and "inhabitant" are not synonymous. One may be a citizen of a State without being an inhabitant, or an inhabitant without being a citizen.

Quinby *vs.* Duncan, 4 Har. (Del.), 383.

3. On the other hand the words "inhabitant" and "resident" are usually so regarded.

In re Wrigley, 8 Wend., 134, 140.
Roosevelt *vs.* Kellogg, 20 Johns., 210.
Brown *vs.* Boulden, 18 Tex., 434.
Barney *vs.* Oelrichs, 138 U. S., 529, 533,
People *vs.* Platt, 50 Hun, 454, 458.
Bouv. Law Dic., tit. "Residents."
Century Dictionary, Vol. V., tit. "Resident."

4. The English courts recognize the competency of American corporations to acquire a residence in England.

Newby *vs.* Fire Arms Co., L. R., 7 Q. B., 293.
Carron Co. *vs.* MacLaren, 5 H. L. C., 516.
Dicey's Law of Domicil, p. 112.

In Newby against Fire Arms Company,

ut supra heard before Chief Justice Cockburn and Blackburn, Meller & Quain, J. J., which was a rule to show cause why an order of a master, setting aside the writ and service thereof, so far as regarded said company, should not be rescinded, it appeared that said company, was not an English Corporation, but an American Company, incorporated under American law; that it had a place of business in England and there carried on business just as an English corporation might do, but that its principal place of business and head office was in America. The writ was served on the manager of the company in England. It was claimed that the company being an American corporation, was resident in America, and must be served, if at all, as a foreigner resident out of the jurisdiction.

Mr. Justice Blackburn, delivering the opinion of the Court, at page 295, says:

"Such a corporation does, for many purposes, re-
"side both in England and in its own country. In
"the case of Carron Iron Company *vs.* Maclaren, 5
"H. L. Cas., 459, Lord St. Leonards, taking a differ-
"ent view of the facts from that taken by Lords
"Brougham and Cranworth, thought the Scotch cor-
"poration was resident in England. We think that
"there is great good sense in what Lord St. Leonards
"states to be the law on his view of the facts: He
"says 'if the service on the agent is right, it is
"because, in respect of their house of business in
"England, they have a domicile in England; and,
"in respect of their manufactory in Scotland, they
"have a domicile there.' There may be two domi-
"ciles and two jurisdictions; and, in this case, there
"are, as I conceive, two domiciles and a double sort
"of jurisdiction, one in Scotland and one in Eng-
"land; and for the purpose of carrying on their
"business, one is just as much the domicile of the
"corporation as the other."

Mr. Justice Blackburn also says:

"In the present case, the fact is clear that the "American Company are carrying on the trade "themselves in London, and, therefore, we think, "must be treated as resident there."

The Court made the rule absolute and rescinded the order of the Master, setting aside the service of the writ, so far as regarded the Fire Arms Company.

In Carron Co. *vs.* MacLaren, at p. 449, Lord St. Leonards says: "The first question is, were the ap- "pellants within the jurisdiction, so as to authorise "the Court to enjoin their proceedings? They are "incorporated, and they are called a Scotch corpor- "ation; their manufactories are in Scotland, but "they have houses of business in England, which "they necessarily carry on by agents or managers; "and they have real as well as considerable per- "sonal property in England. The testator was a "shareholder at his death, to the extent of £80,000; "and his representatives are entitled to his shares, "and are, in truth, partners in the concern. I think "that this company may properly be deemed both "Scotch and English. It may, for the purposes of "jurisdiction be deemed to have two domiciles. Its "business is necessarily carried on by agents, and "I do not know why its domicile should be con- "sidered to be confined to the place where the "goods are manufactured. The business transacted "in England is very extensive. The places of bus- "iness may, for the purposes of jurisdiction, prop- "erly be deemed the domicile. The corporation can- "not have the benefit of its place of business here "without yielding to the persons with whom it "deals a corresponding advantage."

Dicey, *ut supra* says: "It may be maintained, "that a corporation can have two domiciles. In sup- "port of this view, are cited cases in which it has "apparently been decided, that a corporation can, "for the purpose of being sued, have a domicile "in each of two countries."

5. This Court has itself recognized that a cor-

poration—a "juridical person" (Grier J., Marshall *vs.* B. & O. R. Co. 16 How., 314, 328)—may have two domiciles and a double sort of jurisdiction.

N. E. Mutual Life Ins. Co. *vs.* Woodworth, 111 U. S., 138.

St. Clair *vs.* Cox, 106 U. S., 350.

Louisville Railroad Company *vs.* Letson, 2 How., 497.

See also, Speer on Removal of Causes, 338.

Morawetz on Corporations, vol. II., p. 817, §958, note 2, 2d ed.

In St. Clair *vs.* Cox, *ut supra*, (at p. 355,) Mr. Justice Field says:

"This doctrine of the exemption of a corporation "from suit in a State other than that of its crea- "tion, was the cause of much inconvenience and "often of manifest injustice. The great increase "in the number of corporations of late years, "and the immense extent of their business, only "made this inconvenience and injustice more fre- "quent and marked. Corporations now enter into "all the industries of the country. The business of "banking, mining, manufacturing, transportation "and insurance is almost entirely carried on by "them, and a large portion of the wealth of the "country is in their hands. Incorporated "under the laws of one State, they carry on "the most extensive operations in other "States. To meet and obviate this inconvenience "and injustice, the legislatures of several States in- "terposed and provided for service of process on "officers and agents of foreign corporations do- "ing business therein, whilst the theoretical "and legal view that the domicile of a "corporation is only in the State where "it is created, was admitted, it was perceived that "when a foreign corporation sent its officers and "agents into other States and opened offices, and "carried on its business there, it was, in effect, as "much represented by them there as in the State "of its creation. As it was protected by the laws

"of those States, allowed to carry on its business "within their borders, and to sue in their courts, it "seemed only right that it should be held responsi- "ble in those courts to obligations and liabilities "there incurred. All that there is in the legal resi- "dence of a corporation in the State of its creation "consists in the fact that by its laws the corpora- "tors are associated together and allowed to exercise "as a body certain functions, with a right of "succession in itsmembers. Its officers and agents "constitute all that is visible of its existence; and "they may be authorized to act for it without as well "as within the State. There would seem, therefore, "to be no sound reason why, to the extent of their "agency, they should not be equally deemed to "represent it in the States for which they are "respectively appointed when it is called to legal "responsibility fortheir transactions."

In N. E. Mutual Life Ins. Co. *vs.* Woodworth, *ubi supra*, at page 146, Mr. Justice Blatchford says:

"In the Courts of the United States it is held that "a corporation of one State doing business in an- "other is suable in the Courts of the United States "established in the latter State, if the laws of that "State so provide, and in the manner provided by "those laws. Lafayette Ins. Co. *vs.* French, 18 "How. 404; Railroad Co. *vs.* Harris, 12 Wall. 65; "Ex parte Schollenberger, 96 U. S. 369; Railroad *vs.* "Koontz, 104 U. S. 5, 10."

"In Louisville Railroad Company *vs.* Letson, "Mr. Justice Wayne, at p. 558, says: "Lord Coke, says: 'every corporation and body "politic residing in any county, riding, city "or town corporate, or having lands or tene- "ments in any shire, *qua propriis manibus et* "*sumptibus possident et habent*, are said to be in- "habitants there, within the purview of the "Statute.' In the case of King *vs.* Gardner, in "Cowper 79, a corporation was decided by the Court "of Kings' Bench, to come within the descrip- "tion of occupiers or inhabitants. In the Bank "and Deveaux (5 Cranch 84), the case relied up- "on most for the doctrines contended for by the "plaintiff in error, it is said of a corporation, 'this

"ideal existence is considered as an inhabitant "when the general spirit and purpose of the law "requires it.'"

Judge Speer, § 24, says:

"A corporation, while it can only be a citizen and "have its legal residence in the State which creates "it, may through its agents become an inhabitant "of several States, so that it may be sued."

Morawetz, *ubi supra*, says:

"It is sometimes said that a corporation must "'dwell' or 'reside' in the place of its creation, and "that it cannot' 'migrate' to another sovereignty. "Bank of Augusta *vs.* Earle, 13 Pet. 588; State *vs.* "Milwaukee &c. Ry. Co., 45 Wis. 579. This lan- "guage is wholly unmeaning unless it is used in "a figurative sense. A corporation may act through "its agents in foreign States just like a corpartner- "ship or a single individual. Strictly speaking, "neither a corporation nor a copartnership can re- "side or migrate anywhere independently of the "individual shareholders composing it, but the "State under whose laws the company was formed, "or the principal place of business of the company, "may, by a figure of speech, be called its dwelling "place or residence, and may be so regarded within "the meaning of the laws."

6. A learned judge of the District Court of the U. S. for the Western District of Texas, in sustaining the position for which petitioner's counsel here contends, says:

"It is also said by the Supreme Court, speaking "of a corporation: 'This ideal existence is con- 'sidered as an inhabitant when the general spirit "and purposes of the law require it.' And the Court "propounds the question: 'If it be so for the pur- "poses of taxation, why is it not so for the purposes "of a suit in the Circuit Court of the United States, "when the plaintiff has proper residence?' (2 How. "559) The inquiry may be further extended. Do "not the general spirit and purposes of the law re-

" quire a foreign corporation to be an inhabitant of " a State when it has agents who transact its cor- " porate business there, and when, under the laws " of that State, it may be sued there, and service of " process had upon such resident agents? " To deny its inhabitancy under the cir- " cumstances named, would deprive the Cir- " cuit Courts of jurisdiction in an import- " ant class of cases, which it is thought was " never intended by Congress in the enactment of " the law of March 3, 1887. For example, an Eng- " lish land, insurance, mortgage, or cattle company, " doing business in Texas, through the medium of " its agents, has the right to invoke the aid of the " Circuit Courts to enforce its rights of property in " a suit against a citizen of Texas. But if the cor- " poration be, as urged by the defendant, an inhab- " itant only of England, the same Courts would be " powerless to extend relief to the Texas citizen. " Such seems not to be the doctrine of the English " Courts nor of the Supreme Court of the United " States. If I understand the decisions, in my " judgment, it is going too far to suppose that the " Circuit Courts are stripped of their jurisdiction in " cases of that character, by the mere omission in " the Act of 1887, of the words contained in the Act " of 1875, ' or in which he shall be found at the time " of serving such process or commencing such pro- " ceeding.' "

See

Zambrino *vs.* Galveston, 38 Fed. Rep., 449, 455.

To same effect, see

Riddle *vs.* N. Y., L. E. & W. R. Co., 39 Fed. R., 290.

Consolidated S. S. Co. *vs.* Lawrence C. S. S. Co., 41 Fed. R., 833.

Miller *vs.* Mining Co., 45 Fed. R., 345.

In Miller *vs.* Mining, *ut supra*, at page 347, Deady, *J.*, says :

" Between being thus found in a district and being " an inhabitant thereof there is no substantial dif-

"ference. The reason for dropping this clause in "the Act of 1888, I apprehend, was the liability to "hardship or inconvenience, in the case of natural "persons who might be thus sued far from home "and the means of defense, while traveling through "the country on business or pleasure, without the "least element of inhabitancy in the case. But "this can never be the case with a foreign corpora- "tion established in business in the district other "than a place of its organization.

"It is not probable that Congress intended to "give a corporation, the subject of a foreign state, "engaged in business, with a local habitation in "the United States, the option of suing a citizen of "the United States in a national court, and to deny "such citizen having a controversy with or a de- "mand against such foreign subject, engaged in "business in the United States, the corresponding "privilege.

"And yet, if a corporation, the subject of a "foreign state, cannot become an inhabitant of "this district, because it cannot migrate here and "become a citizen of the state, such result will "follow.

"'An inhabitant of a place is one who ordinarily "is personally present there, not merely in *itinere*, "but as a resident and dweller therein.' Holmes *vs.* "Railway Co., 6 Sawy. 277; 5 Fed. Rep., 523.

"A natural person may be a citizen or subject of "one country and an inhabitant of another. Why "cannot a corporation formed under the laws of "Great Britain become an inhabitant of Oregon?

"Take this case for instance:

"The defendant, the Eastern Oregon Gold Min- "ing Company, is a corporation formed in London "for the express purpose of purchasing, owning, "and working a mine in Oregon. It has no other "property or business, and is here in the person of "its officers and agents engaged in working the "mine.

"The Supreme Court has not passed upon this "question, and until it does I shall follow the dic- "tates of my own judgment, which is that the "defendant is an 'inhabitant' of this district within "the meaning of the judiciary act."

In Riddle against N. Y., L. E. & W. R. Co., 39 Fed. R., page 290, it was held by the Judges of the Circuit Court of the Western District of Pennsylvania on a motion to set aside the service of a writ of summons, that a Corporation organized under the laws of the States of Illinois, could become an inhabitant of the State of Pennsylvania.

At page 291, the Court says:

"What good reason, then, is there for exempting the company from suit in a federal court sitting in Pennsylvania? Can it be supposed that such was the intention of Congress? Under previous laws a person was suable in any district in which he might be found. Although he might have been a mere sojourner in, or was simply passing through the district, he was liable to be served therein with process from a federal court. This was the mischief which Congress intended to remedy by omitting from the act of 1887, the words 'or in which he shall be found.' But, clearly, under the provisions of the act of 1889, if a citizen of a state without changing or intending to change, his citizenship, becomes an inhabitant of another state, or, in other words, has his domicile or fixed residence therein, he is suable in the latter state by original process from a federal court. Parker *vs.* Overman, 18 How., 137. Now, in our judgment it was not the intention of the act to make any distinction in respect to liability to suit between natural persons and corporations. As a corporation is a 'person' within the meaning of the act, so, also, may it be an inhabitant."

See also Scott against Texas Land & Cattle Company, 41 Federal R., page 225.

In Purcell against British Land & Mortgage Co., 42 Fed. R., p. 465, at page 467, Mr. Justice Foster, says:

"It is not improbable that a citizen of one state

" or country, whether an individual or a corporation,
" may, at the same time, be an inhabitant of another
" State or country, and, as such, subject to be sued
" in the federal courts."

7. The cases in this Court, relied upon to sustain the contrary view, are the following, namely:

Ex parte Schollenberger, 96 U. S., 369.
Railroad Company *vs.* Koontz, 104 U. S., 5.

In the Schollenberger case, however, Chief Justice Waite at page 375 expressly says:

" It is unnecessary to inquire whether these sev-
" eral companies were inhabitants of the district.
" The requirements of the law for all the purposes of
" this case are satisfied, if they were found there at
" the time of the commencement of the suits."

The case of the Railroad Company against Koontz, involved only the question whether a corporation doing business in a State other than that that in which it was incorporated, by that act, ceased to be a citizen of the former, and so lost its right to remove a case from the State to the United States Court, and this Court held that it did not.

It is true that in the Koontz Case, Chief Justice Waite says that a corporation cannot migrate nor change its residence without a consent, express or implied, of its State, but by the use of the word " migrate," the same employed by Chief Justice Taney in the Bank against Earle (13 Pet. 519, 588,) it is clear, that the Court meant simply that it was not competent for a corporation to change its status of citizenship as fixed by the State of its creation, without the consent lawfully given of the proper State authority.

Third.

The Quincy Mining Company, at the time of the commencement of the suit referred to in the petition was an inhabitant of the State of New York and a resident of the City of New York, in the Southern District of New York.

The complainant in the suit referred to in the petition, the petitioner herein, was at the time of the commencement of said suit a citizen and resident of the State of Massachusetts.

The three individual defendants in this suit were all citizens of the State of New York and residents of the City of New York, in the Southern District of New York.

The other defendant, the Quincy Mining Company, was a corporation organized under the laws of the State of Michigan, pursuant to an act of the Legislature of said State, approved May 11, 1877, and Section 30 of said act expressly provided that it should be lawful for any company organized thereunder to provide in its articles of association for having "the business office" of said company out of the State and to hold the meetings of its stockholders and directors at said office.

The fifth article of the certificate of incorporation of said company provided that "the business office" of the company formed thereunder should be in the City, County and State of New York, while another business office was to be established at the mine in the County of Houghton in the State of Michigan.

There was, therefore, express legislative authority

by the State which created the corporation for its having its business office in the City, County and State of New York.

If ever a corporation can become an inhabitant or resident of a State other than that in which it is organized, certainly this Quincy Mining Company has become a resident and inhabitant of said City, County and State.

1. It derived its powers, express and implied from the laws of the State under which it is organized, and the State which created it made express provision for its becoming such inhabitant and resident.

2. When the corporation was created its articles of association made express provision for its having its principal business office in the City of New York.

3. Its principal office was at the time of the commencement of said suit and for upwards of ten years past had been in the City of New York.

4. All the meetings of its stockholders are held in the City of New York.

5. All the meetings of its directors are held in said city.

6. It has three executive officers, a President, and a Secretary and Treasurer, and they are all citizens of the State and residents in the City of New York.

7. All of its business is transacted in the City of New York, save alone that immediately connected with the mining operations, for which purpose it has a local mining office at the mine at Houghton, Michigan.

Fourth.

The Quincy Mining Company was served with process in accordance with the laws of the State of New York.

This Court will take judicial notice of the provisions of the Code of Civil Procedure of the State of New York.

Gormley *vs.* Bunyan, 138 U. S., 623.

In this case, at page 635, Mr. Justice Lamar says:

"The courts of the United States take judicial "notice of all the public statutes of the several "States."

The return of the Marshal shows that the service of the writ of subpœna in the suit referred to in the petition was made in strict accordance with Section 432 of the Code of Civil Procedure. That section which relates to the personal service of process upon a foreign corporation expressly provides as follows:

"Personal service of the summons upon a defen- "dant being a foreign corporation must be made by "delivering a copy thereof within the State as fol- "lows:

"1. To the President, Treasurer or Secretary, or "if the corporation lacks either of those officers, to "the officer performing corresponding functions "under another name."

The Quincy Mining Company carried on its business in the City of New York. Impliedly, therefore, it submitted itself to the jurisdiction of, not alone its Courts, but the Federal Courts which are located therein. Consent to be sued in a particular locality may exist expressly, as in the case of a

particular agreement (*Ex parte* Schollenberger, 96 U. S., 369), or, impliedly, by carrying on all its business and doing all the acts in such State which it could do if it were a creature created by it.

This is an inevitable inference from the rulings of this Court in the cases above cited, and in that of Railroad Co. *vs.* Harris, 12 Wall. 65, in which case at page 84, this Court said :

"We entertain no doubt that it made the company "liable to suit, where this suit was brought (the "State granting the right to extend the road) in "all respects as if it had been an independent cor- "poration of the same locality."

Fifth.

Congress did not intend the serious consequences, involved in the ruling of the Circuit Court, in amending the Act of 1875, as it did by the Acts of 1887 and 1888.

The question is one of construction and the spirit rather than the letter of the Statute should control.

The requisite diverse citizenship exists, and if the petitioner cannot maintain his suit in said Circuit Court, if the facts alleged in his bill of complaint therein are true, a great wrong may go unpunished.

The complainant is a resident and citizen of the State of Massachusetts. The individual defendants are all residents and citizens of the State of New York. The corporation defendant is organized under the Laws of the State of Michigan.

It is apparent, therefore, that no jurisdiction over the individual defendants could be had in the Circuit Court of the United States, for the District of Michigan, in which the corporation defendant has its Michigan office.

It is also apparent that the complainant could not bring his suit in the United States Circuit Court for Massachusetts.

It therefore follows conclusively, that unless the complainant can maintain his suit in the Circuit, he cannot do so in any of the United States Courts.

Again, it is said that the complainant could maintain his suit in the State Courts, either of Michigan or of New York.

Of course, he cannot get jurisdiction over the individual defendants in Michigan, and without jurisdiction over such defendants, and ability to serve them personally with process, no judgment that he might obtain would be of any value.

As to jurisdiction in the State Courts of New York, the complainant being a non-resident, and the defendant being a foreign corporation, it is, at least, doubtful whether under Section 1780, of the Code of Civil Procedure, jurisdiction exists in such State Courts, to give to the complainant the relief which he seeks in this suit.

The Statute of the State under which this corporation was created expressly contemplated that a corporation existing thereunder might have its *habitat* in another State, for it in terms provided, that it might designate its "place of business" in another State.

The individuals who organized this artificial entit-

availed themselves of the permission conferred by this Statute and, in their articles of association, provided that the place of business, the real home of the corporation, should be in the City, County and State of New York.

That State permits all foreign corporations to do business therein and requires only from a limited class designations as to persons for service, and provides generally for service of process on all.

In an exact, strict sense, a corporation can, it may well be conceded, be neither a citizen, an inhabitant or a resident, or found in any other place than in the State wherein it was created.

To hold that it may be either is a fiction or presumption legally indulged or permitted.

As applied to a person of course there is a manifest distinction.

Prior to the decision of this Court in Ex parte Schollenberger (96 U. S., 369) many of the Circuits had held that a corporation could not be found in any other District than one in a State under the laws of which the corporation was created.

Prior to the decision of this Court in Louisville & Nashville R. R. Co. *vs.* Letson (2 How., 497), it had been held that a corporation could not be deemed even a citizen of a State by which it was created.

But the growth of business of corporations required that the Statutes enacted by Congress should be so construed by this Court as to permit a corporation to be deemed in law a citizen of a State in the one case, and to be found in a State other than that of its creation in the other.

If it can be properly held, as it has been, that a corporation can be found in a State other than that of its creation what hardship is there in holding that under like circumstances a corporation is to be deemed, in law, a resident or inhabitant of such State.

How can a corporation be found in a State unless it has, in law, become an inhabitant or resident thereof.

Sixth.

The motion for leave to file the petition should be granted and a rule issued requiring the Judges of the Circuit Court of the United States, for the Southern District of New York, to show cause why a writ of mandamus should not be granted as prayed for in the petition herein.

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